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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE SOMAYYA.

Parvateneni Bhushayya .. *Appellant**

*v.*

Potluri Suryanarayana and others .. *Respondents.*

*Contract Act (IX of 1872), sections 140 and 141—Surety—Guarantee for part of debt—Discharge of such fraction—Right of indemnity—Transfer of securities not necessary—Right of proportionate recourse against securities held by creditor—Applicability of section 92, Transfer of Property Act (IV of 1882).*

Under section 140 of the Indian Contract Act the surety is entitled to demand all the securities held by the principal debtor at the time of payment whether they had been received simultaneously with the loan advanced or subsequently. The words " is invested with all the rights which the creditor had against the principal debtor " make it plain that even without the necessity of a transfer, the law vests those rights in the surety. And section 141 of the Act when it says that a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into does not enable the creditor to withhold from the surety any security actually held by him at the time when the debt is paid ; it only means that the surety cannot complain if before payment the creditor loses or parts with a security obtained by him after the contract of suretyship was entered into.

A security held by a creditor for a debt or for several debts in common is to be apportioned to every part of the debt or to each of the several debts proportionately. On payment the benefit of the security *pro tanto* passes to the surety who pays, unless he has waived or abandoned it. The condition laid down by section 140 for the right to arise is the payment by the surety of all that he is liable for and not the payment of all that may be due to the creditor who holds the securities. Where the guaranteed debt is only a distinct fraction of the debt the surety's right comes into existence immediately on payment of that fraction, for that fraction is, so far as he is concerned, the whole, and he is entitled *pro tanto* to the security held by the creditor as cover for the debt as a whole.

English cases discussed.

*Govardhandoss Goculdoss Tejpal* v. *Bank of Bengal*, (1890) I.L.R. 15 Bom. 48, not followed.

Section 92 of the Transfer of Property Act has no application to a case where the surety seeks to work out the right of indemnity conferred on him under section 140 of the Contract Act. It will not make any difference that in respect of the debt guaranteed the principal debtor had given a mortgage as additional security.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam dated 8th August, 1940, and passed in O. S. No. 27 of 1937.

*T. R. Venkatarama Sastri* and *B. Manavala Chowdhry* for Appellant.

*B. Sitarama Rao, N. V. B. Shankar Rao* and *A. Lakshmayya* for Respondents.

The Judgment of the Court was delivered by

*Krishnaswami Ayyangar, J.*—The suit out of which this appeal has arisen was instituted by a surety who has paid the principal debt and who therefore claims to be entitled to the benefit of the security held by the creditor at the time when the debt was discharged. The suit having been dismissed, the surety has preferred this appeal.

In order to appreciate the questions which arise for consideration in the appeal it is necessary to refer to a few facts. On the 23rd May, 1930, Bhushayya the

* Appeal No. 170 of 1941. 13th August, 1943.

appellant executed an on demand promissory note in favour of Potluri Suryanarayana and brothers, Chitta Venkateswarlu and Anne Veerayya promising to pay at the Imperial Bank of India, Bezwada, a sum of Rs. 6,000 for value received. The payees endorsed the promissory note in favour of the Imperial Bank, and received the sum of Rs. 6,000 from the endorsee. It is now common ground that by this transaction, whatever its form, the Imperial Bank lent the sum of Rs. 6,000 to the endorsers, the appellant Bhushayya being merely the surety for them. Although strictly under section 37 of the Negotiable Instruments Act the maker would be the principal debtor and the endorsers the sureties, yet it is clear that there was here a contract to the contrary within the meaning of the section. It may be mentioned that the transaction in question was in accordance with the method ordinarily adopted by the Imperial Bank whenever it advanced loans of this type. There were two other transactions similar in nature, the sureties however being different. The earlier of these is evidenced by a promissory note dated 26th April, 1930, for Rs. 6,000 executed by Hanumara Venkayya in favour of the same debtors, Potluri Suryanarayana brothers, Chitta Venkateswarlu and Anne Veerayya and by them endorsed in favour of the Imperial Bank. The later one is represented by a promissory note dated 19th May, 1930, for Rs. 5,000 executed by Koduri Janakiramayya and Uppalapati Janakiramayya in favour of the same individuals as in the other two promissory notes and similarly endorsed by them in favour of the Bank. The business relationship between the several payees under the promissory notes is not disclosed in the promissory notes themselves, but it appears from a letter, Ex. F, executed and delivered by them to the Imperial Bank on 24th July, 1928. In this letter they declared that they were trading in partnership under the style of "Potluri Suryanarayana brothers and Chitta Venkateswarlu, Anne Veerayya Dosapadu" and agreed that all transactions entered into by either or any of them whether under the signature of the firm or subscribed by the individual signature of the person entering into the transaction might be regarded by the Bank as entered into and on behalf of the firm. This admission of the existence of the relationship of partners between the endorsers has been sought to be got rid of as being untrue in fact and we shall revert to this point later. To proceed with the narrative, when the Imperial Bank found that the monies advanced were not repaid within the stipulated time, it insisted upon the security of immovable property being furnished, and accordingly Potluri Suryanarayana (first defendant) on behalf of himself and his minor sons (defendants 3 and 4) and his brother Potluri Venkataratnam (2nd defendant) on behalf of himself and his minor son (5th defendant) executed in favour of the Imperial Bank a deed of simple mortgage to secure the repayment of the balance due on the three promissory notes which at the time amounted to Rs. 15,190-1-9. The deed contains the recital that the mortgagors were unable to pay the said amount of Rs. 15,190-1-9 and requested the Bank to forbear from suing them and in consideration thereof they offered to execute the mortgage deed "to further secure the due repayment" of the said sum and interest due and payable under the promissory notes. The mortgagors covenanted to pay the Bank the money due to it on 15th July, 1931; but inasmuch as the monies were not paid within the extended time the Imperial Bank instituted three suits on the three promissory notes, O. S. Nos. 43, 44 and 45 of 1933 respectively in the Subordinate Judge's Court of Bezwada for the recovery of the amounts and in due course obtained decrees thereon against the makers and the endorsers of the several promissory notes and the members of their family. Bhushayya, the surety in respect of the promissory note of the 23rd May, 1930, was amongst others, impleaded in O. S. No. 43 of 1933 and became liable as a judgment-debtor for the decree passed therein. Between the 4th August, 1934, and the 9th January, 1935, Bhushayya discharged the decree debt in full by payment in instalments of a total sum of Rs. 8,878-3-0. Hanumara Venkayya, who was the surety in respect of the promissory note of the 26th April, 1930, and who was one of the judgment-debtors in O. S. No. 44 of 1933, the suit instituted by the Imperial Bank to enforce it, similarly discharged the decree by payment of a sum of Rs. 5,726-10-6 on several dates between the 25th October, 1934, and 25th June, 1935. But the sureties in respect of the third promissory

note dated 19th May, 1930, of Rs. 5,000 failed to discharge the decree passed against them in O. S. No. 45 of 1933. There were negotiations between the Bank on the one hand and one Yerneni Satyanarayanamurthi, the brother-in-law of Potluri Suryanarayana on the other for the transfer of the decree in O. S. No. 45 of 1933 and the mortgage aforesaid in favour of the former and accordingly a sum of Rs. 500 was paid by him on 18th August, 1936, and a further sum of Rs. 3,250 was paid on 15th September, 1936. On thus receiving a total sum of Rs. 3,750 the Bank assigned the decree in O. S. No. 45 of 1933 as well as the mortgage deed dated 15th April, 1931, to Hanumara Venkayya (10th defendant). The deed of assignment (Ex. I) contains the recital that the sum of Rs. 3,750 was received by the Bank from Yarneni Satyanarayanamurthi on behalf of the assignee. This deed as well as the plaint in O. S. No. 43 of 1933 show that the mortgage deed had been taken as an additional security and without prejudice to the rights of the Bank under the several promissory notes. The importance of this circumstance will appear later when we discuss the legal argument put forward on behalf of the respondents.

From this statement of facts it would appear that the two sureties Bhushayya and Hanumara Venkayya duly discharged the debts due to the Imperial Bank by payment of the respective amounts for which they had made themselves liable to the Bank. As regards the third promissory note, the sureties failed and neglected to perform their obligations and the decree in O. S. No. 45 of 1933 and the rights of the mortgagee to recover the decree amount from out of the properties mortgaged under the mortgage of the 15th April, 1931, were assigned to Hanumara Venkayya for consideration paid by him. There was some faint argument that the consideration really came from the Potluri defendants (defendants 1 to 5) but when analysed, it rests on no better foundation than the suspicions arising out of the relationship between Potluri Suryanarayana and Hanumara Venkayya. This is too slender a basis for holding that the money came not from Hanumara Venkayya but from his brother-in-law Potluri Suryanarayana. We must accordingly negative the contention that it was Potluri Suryanarayana who really discharged the decree in O. S. No. 45 of 1933.

The substantial question which arises for consideration on these facts is what precisely are the rights of Bhushayya and whether in the events which have happened he has become entitled solely or along with Hanumara Venkayya to enforce the mortgage of the 15th April, 1931. His prayer in the suit was that he may be declared to be solely entitled to the benefit of the mortgage deed but in the alternative he has prayed that he may be declared entitled to an interest therein proportionate to his claim along with Hanumara Venkayya and the Imperial Bank. On the footing that the interest of the Imperial Bank has passed to Hanumara Venkayya, the second of these prayers means that Bhushayya claims an interest in the mortgage in the proportion which the amount he has paid bears to the full amount due on the mortgage. Hanumara Venkayya being entitled to a similar interest in respect of the payments made by him to discharge the two decrees in O. S. Nos. 44 and 45 of 1933. This indeed is precisely the appellant's claim before us as adumbrated by his learned advocate. It is resisted by Potluri Suryanarayana and the members of his family who are defendants 1 to 5—principal debtors—and also by Hanumara Venkayya who is the tenth defendant. Defendants 6 to 9 are members of the family of Anne Veerayya who is now dead. The Imperial Bank of India, Bezwada, was joined as the 11th defendant. But in the events which have happened it has no interest in the litigation and hence was exonerated from the suit. Defendants 1 to 5 pleaded that they were not in fact partners with Chitta Venkateswarlu and Anne Veerayya as stated in Ex. F, the letter passed to the Imperial Bank on the 24th July, 1938. The first defendant stated that he was never in fact a partner and that he gave the letter merely to oblige Anne Veerayya and Chitta Venkateswarlu so that their firm might obtain loans from the Bank for the purpose of their business. He also stated that he acted only as a surety to procure loans to that firm and that in consideration of the loans to be obtained from the Bank on the strength of the

partnership letter he was promised a sum of Rs. 2,000 every year by way of commission. It was never intended it was said that they should become partners in it. This contention formed the subject-matter of issue 2. The learned Subordinate Judge has accepted this contention and has found that defendants 1 to 5 were not partners in the business carried on by the firm of Anne Veerayya and Chitta Venkateswarlu, but were only capitalists, who advanced their funds for a certain consideration for the carrying on of the business of the borrowers. In our opinion, this finding is entirely unjustified by the evidence on the record. The first defendant having unequivocally declared that he and the members of his family were partners in the business, the burden is heavily upon them to make out their contention to the contrary. In his evidence he stated that Anne Veerayya and Chitta Venkateswarlu had been carrying on business from 1926 and that in July, 1928, the name of the firm was changed with his knowledge to P. Suryanarayana brothers and C. Venkateswarlu and Anne Veerayya, P. Suryanarayana being his own name. In fact, from July 1928 onwards the accounts of the business ran in the new name and this was admittedly known to the first defendant. He then gave the explanation:

> " My name was added in the firm's name merely to get loans from the bank. For supplying money to the firm I was given some commission. I was always looking into the accounts. I never objected to the inclusion of my name in that firm's name. I was to be paid Rs. 2,000 a year irrespective of loss or profit. I had to advance Rs. 30,000 and I was to be paid interest also on it."

These answers do not indicate that he was not to be a partner, but only that he agreed to become a partner on certain special terms and conditions agreed to between the parties. But it is difficult to accept the evidence of this witness at its face value because we have in Ex. XV-a an entry in the day book of the firm made in his presence which runs as follows :

> " Debit—to profit and loss account. Amount relating to the balance transferred to the accounts of Chitta Venkateswarlu and Anne Veerayya, *according to the deed of partnership executed on 15th July, 1928.*"

From this entry it is perfectly clear that a deed of partnership came into existence on 15th July, 1928. The entry Ex. XV-b takes the matter further. It shows that a sum of Rs. 2,000 was credited to the first defendant's family, being :

> " the amount of commission settled to be paid to you upto this day *in accordance with the deed of partnership executed on 15th July, 1928.*"

Thus, there can be no doubt that there was, as disclosed by these entries, a deed of partnership which governed the rights and liabilities of the first defendant and the other partners in the firm. The deed has been suppressed and a mendacious explanation was sought to be given by the first defendant in the box. He stated that that date 15th July, 1928, in Ex. XV-b was a mistake for 13th July, 1928, and that there was in fact no partnership deed other than Ex. XIV. It is perfectly plain that this is a false statement because Ex. XIV does not contain any provision for the payment of commission to the first defendant. The learned Subordinate Judge erred in not attaching due weight to the non-production of the deed of partnership and the falsity of the explanation given. He is also in error in thinking that defendants 1 and 2 were not shown as partners in the accounts. In fact, the heading of the account says that they were partners. That defendants 1 to 5 were not to share the profits and losses of the business is by itself not sufficient to make out their case that they were not partners. The Court must in every case have regard to the true contract and intention of the parties as appearing from the whole facts of the case. We are of opinion that the only conclusion possible in this case is that defendants 1 and 2 and the members of their family became in 1928 partners in the business which was previously carried on by Chitta Venkateswarlu and Anne Veerayya. It follows that they were among the debtors to the Imperial Bank, with reference to the debt guaranteed by Bhushayya.

The first contention advanced by the respondents' learned counsel is that the suit is not maintainable because the debt due to the Imperial Bank has not been fully discharged. It is said that the decree in O. S. No. 45 of 1933 which related to the promissory note executed by Koduri Janakiramayya and Uppalapati Janakiramayya has not been discharged ; and it has been only assigned to the tenth defendant. In the alternative it is contended that the tenth defendant has,

standing in the shoes of the Imperial Bank, a superior and not a co-ordinate right with the plaintiff in respect of the rights assigned and effect must accordingly be given to those rights. Before examining these contentions it is necessary to dispose of two other objections raised by the contesting defendants which are entirely without substance ; but which were unfortunately allowed to prevail by the learned Subordinate Judge. The learned Judge has held that Bhushayya is not entitled to maintain the suit inasmuch as his brother Venkataratnam became entitled to the suit amount under a partition arrangement between Bhushayya and his three brothers. This question was considered by the learned Judge in paragraph 29 of his judgment in which he refers to an additional issue (XVI). No such issue however appears on the record, not even in the judgment. The precise form of the issue is not therefore known ; though it is not difficult to understand what the learned Judge had in mind. It is conceded that he proceeded to consider the point in his judgment without an issue before him and he raised the point itself at the time of writing the judgment, in response to an invitation to do so in the final stages of the hearing of the suit. The history of this contention however shows that the learned Judge was not warranted in raising or considering such an issue. Issues in the suit were framed as early as the 16th March, 1938, and as we already indicated, there is no reference to the contention in the issues, or even in the written statements of the parties. On the 22nd August, 1938, I. A. No. 753 of 1938 was filed by the defendants asking for an amendment of the written statement by the addition of the following paragraph :

" The plaintiff and his three brothers, Venkataratnam, Ramakrishnayya and Brahmayya, were all joint and formed an undivided Hindu family by the date of the alleged payment of the suit debt to the Imperial Bank of India by the plaintiff and if the said payment is true, the plaintiff's brothers were also entitled to three-fourths of the suit debt. This defendant submits that the plaintiff became divided with his three brothers subsequent to the said payment and this defendant learns that the suit claim is not partitioned amongst themselves. This defendant submits that the plaintiff alone is not entitled to bring the suit for the whole amount in which his brothers also have got interest and without impleading them as parties to the suit. The suit for the whole claim by the plaintiff alone is not maintainable."

There was also a prayer for amending the written statement by the addition of a prayer for relief under the Madras Agriculturists' Relief Act. This latter prayer was granted, but the amendment which sought to raise the plea of the non-joinder of the brothers of the plaintiff was disallowed by order of Court dated 20th October, 1938. A revision petition against this order was filed in this Court, but was dismissed by Abdur Rahman, J., with the remark that the Court was bound to decide the questions which arose between the parties to the suit and no further, and that if the plaintiff had no right to maintain the suit himself, he would not succeed ; but if he had, the non-joinder of other persons was immaterial. The matter was thus definitely closed. But still the defendants were allowed to rake up the matter again in the cross-examination of the plaintiff. The following answer was elicited from him :

" It is Venkataratnam that is entitled to this amount under the terms of our partition. There is an oral agreement that I should recover this amount and my brother of course taking the risk of it. Our partition is under lists."

The questions which resulted in these answers were clearly inadmissible as they did not relate to the issues before the Court. Fearing that the plea of non-joinder might be allowed to be resuscitated, the plaintiff filed I.A. No. 537 of 1940 on the 19th July, 1940, praying for the addition of his three brothers, Venkataratnam, Brahmayya and Ramakrishnayya. An affidavit was filed in support of the application in which it was stated :

" If, per chance, for any reason, the Court should hold that arguments on the said point may be heard, it is necessary in the interests of justice that necessary evidence therefor on behalf of the plaintiff also should be taken. The plaintiff's three divided brothers are ready to say that the plaintiff has absolute powers to file this suit, to obtain decree and to recover the suit debt and they are ready to join as plaintiffs in this suit."

The application was opposed and it was dismissed on the 29th July,. The order was,

" For abundant caution the Court cannot proceed on unnecessary matters. Dismissed."

The arguments in question in the suit commenced on the 29th July, and it is quite apparent that the plea of non-joinder was pressed. Thereupon a fresh application

I. A. No. 563 of 1940 was filed by the plaintiff on 30th July, 1940, requesting the Court to reopen the suit, add the plaintiff's brothers as co-plaintiffs and take the necessary evidence. The brothers filed separate affidavits consenting to their being joined as co-plaintiffs. The application was opposed by the contesting defendants and was disposed of along with the suit. The learned Judge dismissed the petition along with the suit itself in his judgment holding that the application was belated and that the claim was evidently barred. We are firmly of opinion that the learned Judge was wholly wrong both in allowing the point to be raised and in negativing the successive attempts made by the plaintiff to remedy the error, if error it was. Having considered the matter fully, we hold that the plaintiff is entitled to maintain the suit because he was *eo nomine* the surety and the person who discharged the debt. That the debt fell to the share of a brother of his as a result of the partition in the family is no reason for holding that he is not entitled to maintain the suit because under the self-same arrangement he was the person charged with the duty of collecting the money.

The learned Subordinate Judge also held, and again quite wrongly, that the suit is barred by time. It is evident to him from the dates of the several payments made by Bhushayya that except in respect of the last payment the suit was time barred. The fact however is that all the payments are within three years of the suit. It is unfortunate that the learned Judge has not taken the trouble to look at the dates of the relative payments in Ex. B series. Otherwise he could not have committed such a palpable mistake.

The question still remains whether in the circumstances of this case and the events which have happened the appellant Bhushayya is entitled to an interest in the benefit of the mortgage Ex. H held by the Imperial Bank, the creditor at the time when he as surety discharged the decree debt in O. S. No. 43 of 1933. As already stated, he claims that he is entitled to a share in the mortgage proportionate to the amount of the debt he had discharged, the tenth defendant being entitled to the remaining interest in the mortgage on the ground that he has similarly discharged the debt that he had guaranteed and also obtained an assignment of the third debt still remaining undischarged. It is conceded that the position of the tenth defendant as a surety pure and simple is identical in every respect with that of the appellant. But what is urged is that he is now clothed with the rights and privileges of the Imperial Bank by virtue of the assignment made by it in his favour and he must therefore be regarded as occupying the position of the creditor in respect of the third debt represented by the decree in O. S. No. 45 of 1933. The contention of Mr. Sitarama Rao is that the three debts though originally several and distinct had been consolidated into one single debt in the mortgage Ex. H with the result that the surety Bhushayya cannot claim the benefit of the mortgage or any interest in it until he has fully discharged the debt. It is argued that the third debt had not yet been paid and so long as it is not paid the surety can claim no interest in much less enforce it by suit.

The question of law thus raised falls to be decided by a consideration of the provisions of sections 140 and 141 of the Indian Contract Act, 1872. Section 140 states :

"Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor."

The section embodies the general rule of equity expounded by Sir Samuel Romilly as counsel and accepted by the Court in *Craythorne* v. *Swinburne*[1], namely :

"The surety will be entitled to every remedy which the creditor has against the principal debtor ; to enforce every security and all means of payment ; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety, having a right to those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor. This right of a surety also stands, not upon contract, but upon a principle of natural justice."

1. (1807) 14 Ves. 160 : 33 E.R. 482.

The language of the section which employs the words "is invested with all the rights which the creditor had against the principal debtor" makes it plain that even without the necessity of a transfer the law vests those rights in the surety. In the present case the surety has paid all that he was liable for and it would therefore seem on the language of the section that he has thereby become invested with all the rights which the creditor had against the principal debtors. The Imperial Bank had owing to it three distinct debts guaranteed by three several sureties and in respect of the balances of the debts remaining unpaid, obtained an additional security in the shape of the mortgage, Ex. H. That the Bank continued to regard the three debts as still remaining distinct is borne out by the fact that three separate suits were instituted for enforcing each of them. There is no support in the evidence or in the conduct of the parties for the suggestion that there was a consolidation of the three debts into one single debt. Indeed it seems to us that such a consolidation cannot be made without the consent of the sureties who are likely to be affected by it. That each of the sureties still remained liable for the debt originally guaranteed by him and not for the consolidated amount is made perfectly clear by the statement contained in the deed of mortgage, Ex. H and in the plaint filed by the bank in the three suits in which it is stated that the mortgage was taken by way of further or additional security for the due repayment of the debts. It may be that if there was but one debt for which there were three sureties, the entire debt must be discharged before any of the sureties can claim the rights conferred by section 140. That however is not the case here. The position of Bhushayya is not dissimilar to the case much considered in the English Courts, of a surety who had guaranteed a definite fraction of a debt for the whole of which the creditor held a common security. Before referring to those cases we may point out that there is little doubt on the language of section 140 that the surety is entitled to demand all the securities held by the principal debtor at the time of payment whether they had been received simultaneously with the loan advanced or subsequently. Section 141, when it says that a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, only means that a surety cannot complain if before payment the creditor loses or parts with a security obtained by him after the contract of suretyship was entered into. That appears to have been the rule of equity as understood in England when the Act was passed (see *Newton* v. *Chorlton*[1]). The rule has however been extended by later decisions of the English Courts so as to cover securities given to the creditor both before and after the contract of suretyship. This is clear from *Forbes* v. *Jackson*[2] and *Campbell* v. *Rothwell*[3]. This extension however has not been introduced into the statutory law of India which remains as codified in 1872. What is important to remember in this connection is that section 141 does not enable the creditor to withhold from the surety any security actually held by him at the time when the debt is paid or in any other way to detract from the rights of the creditor as declared by section 140. Section 141 only gives him liberty of action in respect of securities not held by him at the time of the contract of suretyship provided he exercised it before payment.

The question that falls to be decided is whether all the three debts must be fully discharged before any of the sureties can claim an interest in the security taken by the creditor or whether as each debt is discharged the right to a proportionate part of the security passes to the surety making the payment leaving the balance alone of the security available for the creditor for the remaining debts or debt. These questions are by no means easy of solution on the language of sections 140 and 141 of the Indian Contract Act which *prima facie* have reference to the simple case of a surety for a single debt for which the creditor holds a security or securities. We are therefore obliged to seek our guidance from the English decisions which explain the underlying rule of equity in complex cases of the nature now before us. In Ex parte *Rushforth*[4], the debtors who were carrying on business had a running

1. (1853) 10 Hare 646: 68 E.R. 1087.
2. (1882) 19 Ch. D. 615.
3. (1877) 47 L.J. Rep. (Q.B.) 144.
4. (1805) 10 Ves. Jun. 409: 32 E.R. 903.

account with a bank which was guaranteed by a surety. But the guarantee was limited by an express contract to a sum not exceeding £10,000. The surety was secured by the mortgage of an estate given to him by the debtors. The Lord Chancellor Lord Eldon, observed :

"The agreement was to advance all such sums as should be required; but it is limited by an express contract for an obligation to secure all those sums ; and the question is, whether that limitation in the extent of the obligation is not a sufficient ground for the inference, that those sums were not to be extended beyond £10,000, to the destruction of every right of the surety. Take the case of two sureties, each for the separate sum of £10,000 ; each, paying the principal creditor, would be entitled to stand in his place for the sum paid. It would be very wrong to hold, that, as they have taken but one surety, he shall be in a worse situation. I think, the bankers are not entitled in equity to say, as against the surety, that their demand is more than £10,000, the amount of the bond he has given ; upon which he would be *prima facie* entitled to stand in their place ; as to the residue of their debt, they ought to be considered, if I may so express it, as their own insurers. He is entitled to stand in their place, but not for the whole sum of £10,000, for the money produced by the sale of the estate must be considered as received by the bankers. He will, therefore, be entitled to stand in their place for the difference."

If we substitute three for two in the illustration given by the Lord Chancellor it would very nearly represent the facts present before us. The plaintiff Bhushayya one of the sureties on paying the principal creditor would be entitled to stand in his place for the sum paid, that is, entitled along with the Bank to the benefit of the security. In *Paley* v. *Field*[1], the plaintiff who was a surety for monies advanced and to be advanced by certain bankers had by the terms of the guarantee executed by him limited his liability to a sum of £1,500 making it clear that the bankers were not to be indemnified by the plaintiff for any loss which they should sustain by giving credit to the debtor beyond the sum of £1,500 and interest. On the adjudication of the debtor the creditors proved for £3,000 which was the amount for which the debtor had made himself liable and received dividends thereon. The surety paid the sum of £1,500 with interest and then sued for the recovery of the dividends received in so far as they related to the sum of £1,500 guaranteed by him. The creditors contended that they were entitled to apply the sum of £1,500 received from the surety as far as that will extend, to satisfy the loss they might ultimately sustain by the bankruptcy of the debtor and that they were entitled to receive and apply the dividends paid upon the whole debt until they received full satisfaction of the debt due to them from the debtor. Sir William Grant, the Master of the Rolls, was of opinion that there was no substantial distinction between this case and Ex parte *Rushforth*[2]. Indeed he considered the case before him as stronger and clearer of the two as the instrument between the parties made it clear that the sum for which the surety was to be answerable was as against him to be considered as the whole amount of the creditor's demand, whereas in Ex parte *Rushforth*[2], there was no specified limit to the engagement except what was implied by the obligation of the bond. The Master of the Rolls observed :

"Then upon what ground is the equity, which the plaintiff seeks by this bill resisted ? Upon this ground only, that these defendants have given credit to the bankrupt beyond that stipulated sum ; a case, with which by express provision the plaintiff was to have nothing to do. If in consequence of those ulterior advances the bankers are to keep dividends, of which they would otherwise be trustees for the plaintiff, does not he contribute in effect to indemnify them for a loss against which it is expressly provided that he shall not be called upon to indemnify them ; namely, a loss occasioned by their advancing more than the sum of £1,500 ? It is clear, that as between these parties, that sum is to be considered as the amount of the debt. The law resulting from that view of the facts is not a subject of controversy between the parties ; for it is agreed upon that statement the plaintiff is entitled to the equity he seeks by his bill ; to consider them as trustees for him of whatever dividends they draw from the bankrupt's estate *on account of this sum of £1,500*." (The italics are ours).

The Master of the Rolls here makes it clear that the dividends received in respect of that part of the debt which was guaranteed by the surety ought not to be appropriated by the creditor towards the part not guaranteed or to any other debt owing from the same debtor. On payment of the whole of the debt guaranteed whether that whole was a part of a larger debt or not, the surety is entitled to be subrogated to the rights of the creditor in respect of the debt discharged. This does not detract from the principle that the surety must pay the whole of the debt guaranteed by

1. (1806) 12 Ves. Jun. 435 : 33 E.R. 164. 2. (1805) 10 Ves. Jun. 409 : 32 E.R. 903.

him. Only when his liability is limited, as it was limited in the case before the Court, the part is by the contract of the parties to be regarded as the whole. The facts, no less the decision, bear a close resemblance to the later case of *Hobson* v. *Bass*[1] to be noticed later. In *Thornton* v. *McKwan*[2], a guarantee for a fixed sum of £5,000 was given by the plaintiff to a banking company to secure the advances made to the debtor. The bank advanced a larger sum to the debtor and on his death proved against his estate under administration for the full amount of the advance and received dividends thereupon. Afterwards the guaranteed amount, namely, £5,000 was recovered from the surety. It was held that the surety was entitled to the dividends received in the proportion which the sum guaranteed bore to the whole debt proved notwithstanding that the guaranteed debt alone and not the whole of the debt given to the banker had been paid. *Coates* v. *Coates*[3] is a decision on analogous facts. Benjamin Coates first lent a sum of £1,000 on the joint promissory notes of John Green and William Green. William Green joined in the note as surety only. Coates afterwards lent to John Green a further sum of £1,000 on his own promissory note. Sometime later the debtor John Green deposited with the creditor a policy of assurance for £2,000 on his own life as a further security for both the debts. In the insolvency of John Green, Coates having died, his executrix proved for £1,500, for the two debts and received a dividend of £97 and a sum of £97-10*s.* upon surrender of the policy which was the common security for both the debts. The guaranteed debt was fully discharged by a set off claimed by the executrix against the surety and allowed by the Court. The Master of the Rolls, Sir John Romilly, held that the £97-10*s.* which was the produce of a collateral security for both debts, ought to be set off rateably against the amount due on the two notes, on one of which William Green was liable as surety. The result could not have been reached except on the footing that on the discharge of the debt for which the surety was liable, he became invested *pro tanto* with the rights of the creditor in respect of the security held by him for that as well as the other debt. In *Hobson* v. *Bass*[1], the creditors Bass and Company were supplying goods to Edmund Hobson. On 23rd July, 1868, Jesse Hobson agreed to stand guarantee for Edmund Hobson for the due payment of all such goods whether supplied previously or supplied from time to time afterwards to him, until the guarantee should be withdrawn by notice, but so as the surety's liability under the guarantee was not at any time to exceed the sum of £250. A similar guarantee was given on the same date by another person Elizabeth de Lannoy. On 16th November, 1868, Edmund Hobson was adjudicated bankrupt. At the time the debtor was indebted to Bass in the sum of £657 for the whole of which Bass proved in the bankruptcy. On the 23rd June, 1869, he claimed under the guarantees the sum of £250 from each of the two sureties, and received payment accordingly. On the 29th April, 1870, Bass received the sum of £68-8-9 from the trustee in bankruptcy by way of dividend at the rate of 2*s.* 1*d.* on the whole of the outstanding debt of £657. The question was whether each of the sureties was entitled to recover from the creditor a share of the dividends received and to be received in respect of the £657, bearing the same proportion to the whole of the debt, as £250 to £657. The Vice-Chancellor dismissed the claim. On appeal Lord Hatherley, L.C., reversed the decision and upheld the claim observing,

"If a person guarantees a limited portion of a debt, all the authorities shew that if he pays that portion he has in respect of it all the rights of a creditor. The question is, whether the guarantor means 'I will be liable for £250 of the amount which *A B* shall owe you,' or 'I will be liable for the amount which *A B* shall owe you, subject to this limitation, that I shall not be called upon to pay more than £250.' The words of the guarantee are so similar to those in some of the cases cited that it would be splitting hairs to distinguish them. The words 'at any time' are material, and I think the meaning of the instrument is 'I guarantee' the payment of all goods supplied, but my liability is not to be increased by their amount exceeding £250. When it reaches that sum I am to be a surety for it with all the rights of a surety.' It is not then competent to the creditor to say 'I will increase my debt, I will take a dividend on the whole; and though you have paid me the £250 you shall have no rights as a surety till I am paid in full.' It is true that a surety may enter into an

1. (1871) 6 Ch.Ap. 792.
2. (1862) 1 W.R. 140.
3. (1863) 33 Beav. 249 : 55 E.R. 363.

obligation to be liable to a limited amount for the ultimate balance remaining after all monies obtainable from other sources have been applied in reduction of the debt, but a guarantee of that nature must be in a very different form from the present."

The meaning is that when the guaranteed part of the debt is discharged, the surety is entitled to stand in the shoes of the creditor *quod* that part, though the rest of the debt remains undischarged. In respect of each pound of the debt, the creditor received a dividend which ought to go to the surety who had paid, because it is a benefit attached to the debt and accruing from it. Similarly a security held by a creditor for a debt or for several debts in common is to be apportioned to every part of the debt, or to each of the several debts proportionately. On payment, the benefit of the security *pro tanto* passes to the surety who pays, unless he has waived or abandoned it. *Goodwin* v. *Grey*[1] is an application of the principle laid down in *Thornton* v. *McKwan*[2]. The headnote which runs as follows makes the position sufficiently clear :

"A person who becomes surety for a limited amount of a debt has, on paying the amount for which he is liable, all the rights of a creditor in respect of that amount, and is entitled to share in the security held by the principal debtor for the whole debt."

These and certain other earlier cases were reviewed in the judgment of the Court of Appeal in *Ellis* v. *Emmanuel*[3] and the distinction was pointed out between a case where a guarantee is given for the whole debt with a limitation on the liability of the surety to a specific amount, and the case where the guarantee is in respect of a specified part only of a given debt. The case was held on the facts to fall within the former class and it was accordingly decided that the surety was not entitled to the benefit of the security as the whole of the debt had not been paid. Blackburn, J., observed :

"I think in such case it is a question of construction on which the Court is to say whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only. And, as I have already pointed out, I think the bond in the present case expresses an intention that the sureties should each guarantee the whole £7,000 though their liability respectively was limited to the stipulated amounts."

The point is further elucidated by Vaughan Williams, J., in In re *Sass* : Ex parte *National Provincial Bank of England, Ltd.*[4] A debtor became bankrupt and subsequently the surety on demand by the creditor paid him £303-11-9 under his guarantee and then tendered a proof against the bankrupt's estate for £755-16-1, being the whole amount due from the bankrupt. The trustee rejected the proof insisting that it ought to be reduced by £303-11-9 which the bank had received from the surety. Vaughan Williams, J., held that he was wrong in so doing. He pointed out that the common law right of the creditor was to sue the debtor for the whole of the amount that was due from him, irrespective of the sum which was paid by the surety unless that sum amounted to 20*s*. in the pound. The following observations indicate the correct legal position :

"When bankruptcy supervened the right of the principal creditor—the bank—was to prove for that amount, unless there was a surety and that surety was a surety for a part of the debt. In that case if the surety is a surety for the part of the debt, and the surety has paid that part, then by virtue of that payment, the right of proof, which would have been the right of proof of the principal creditor, becomes *pro tanto* the right of proof by the surety. The surety has a right having paid part of the debt in that way to stand *pro tanto* in the shoes of the principal creditor; and even if the principal creditor has proved and has received the dividend, and the surety comes and repays the full amount, the principal creditor would then be trustee for the surety of the amount of the dividend which he had so received. In my judgment, that right of the surety as against the principal creditor only arises in a case where the surety has paid the whole of the debt. It is quite true that where the surety is surety for a part of the debt as between the principal creditor and the debtor, the right of the surety arises merely by payment of the part because that part, as between him and the principal creditor, is the whole."

Holding that the surety in the case before him was a surety for the whole debt with a limited liability, the Court held that he had only paid a part of the guaranteed debt and was therefore not entitled to prove in preference to the creditor.

It seems to us that the crucial question to be determined in cases of this description is whether the surety is a surety for the whole debt with a limited liability

1. (1874) 22 W.R. 312.
2. (1862) 1 W.R. 140.
3. (1875) 1 Ex. D. 157.
4. (1896) 2 Q.B. 12.

or whether he is a surety for a part of the debt only. The present case undoubtedly falls within the latter category, because Bhushayya was the surety in respect of a distinct debt the whole of which he has discharged and there was no further liability so far as he was concerned. Indeed the nature of the guarantee given by him, confined as it was to the promissory note of the 26th April, 1930, sails clear of the complication which the English Courts were called upon to solve in the cases noticed. That being so, his right to a proportionate share in the mortgage security appears to be beyond question. We were however pressed with a decision of a learned Judge, Farran, J., of the Bombay High Court reported in *Goverdhandoss Goculdoss Tejpal* v. *Bank of Bengal*[1], as establishing the proposition that until the entirety of the debts due to the Imperial Bank inclusive of the third debt is paid, none of the sureties can claim any portion of the security held by it. The facts were these : one Khimji Jairam Saoji was indebted to the Bank of Bengal in the sum of Rs. 3,15,000 for which the debtor gave securities which the Bank accepted as good only to the extent of Rs. 1,90,000, that being the value as estimated by it. On this footing the bank considered itself unsecured to the extent of the balance of Rs. 1,25,000 and therefore refused to honour certain bills of the debtor, which then fell due. Thereupon the debtor prevailed on the plaintiff to stand surety for him, and the plaintiff accordingly guaranteed the payment of the sum of Rs. 1,25,000, treated by the bank as remaining unsecured. Subsequently the surety paid the full amount guaranteed by him and then instituted a suit for a declaration that he is entitled to a proportionate share of the securities held by the bank. It was held that the claim was not sustainable. No exception can be taken to the decision on the facts actually before the Court. The securities had been accepted as cover not for the entire debt of Rs. 3,15,000 but only for a definite part of it, namely, Rs. 1,90,000. The plaintiff's guarantee did not relate to this part but to the other part, namely, Rs. 1,25,000 which was apparently treated as a distinct and separate debt in itself. In this view the plaintiff could not claim to share in the securities because they did not relate to the debt guaranteed by him. But the decision was rested on the broad ground that the surety cannot claim the benefit of the securities until the whole of the debt due to the bank had been paid. The learned Judge arrived at this conclusion on a review of most of the English cases on the point, the only case he had not before him being In re *Sass*: Ex parte *National Provincial Bank of England, Ltd.*[2], which came some six years later. With all respect to the learned Judge, we find ourselves wholly unable to agree with him in his appreciation of the effect of the cases considered. The question for decision was formulated in these terms, namely :

> " Whether a surety, who has guaranteed an *aliquot* and defined portion of a past due debt secured by a mortgage, is, on payment by him of the portion of the debt which he has guaranteed, entitled to share in such mortgage in proportion to the amount of the debt which he has guaranteed and paid, before the mortgagee has been paid the full amount of his mortgage debt ?"

The learned Judge answered it in the negative. In his view, the Contract Act has omitted to state when the surety is entitled to have the security made over to him wholly or in part, whether it is when the debt of the creditor is paid off or when the surety pays the amount of his guarantee. Section 140, in our opinion, leaves no room for doubt on the point, because it expressly says that the surety upon payment of all that he is liable for is invested—that is, immediately invested—with all the rights which the creditor had against the principal debtor. The condition laid down by the section for this right to arise, is the payment by the surety of all that he is liable for, and not the payment of all that may be due to the creditor who holds the securities. Where the guaranteed debt is a fraction only of the debt, the surety's right comes into existence immediately on payment of that fraction, for that fraction is, so far as he is concerned, the whole. (*See* In re *Sass* : Ex parte *National Provincial Bank of England, Ltd.*[2]) After referring to Ex parte *Rushforth*[3], *Paley* v. *Field*[4] and *Hobson* v. *Bass*[5], and granting that where a surety limited to

1. (1890) I.L.R. 15 Bom. 48.
2. (1896) 2 Q.B. 12.
3. (1805) 10 Ves. Jun. 409 : 32 E.R 903.
4. (1806) 12 Ves. Jun, 435 : 33 E.R. 164.
5. (1871) 6 Ch. Ap. 792.

a certain amount pays that amount he is entitled to prove against the debtor's estate for the amount so paid, the learned Judge expresses the opinion that the principle does not apply in the case of the creditor applying the securities he holds in payment of the residue of the debt after he has been paid one portion of it by the surety. For according to him this works no apparent injustice to the surety, for he can still sue the debtor and prove against his estate. With respect, we are unable to accept the reasoning as correct. In the first place it is clear both under section 140 of the Indian Contract Act and under the English Law that the surety's right to the benefit of the security vests in him the moment he pays the guaranteed amount. The creditor cannot afterwards make an appropriation to the prejudice of the rights of the surety which have accrued to him. Indeed, he cannot do so even before, as the surety is entitled to the benefit of every security held by the creditor at the time when the contract of suretyship was entered into. Secondly, the question is not whether the surety has a remedy against the principal debtor, which of course he has either to sue him or prove against his estate if he is adjudicated bankrupt, but whether he has any, and if so, what right against the creditor in respect of the securities held by him. We must say that the grounds on which the learned Judge held that the English cases were not applicable do not commend themselves to us. The case of *Goodwin* v. *Grey*[1] was referred to and put aside on the ground that it is irreconcilable with what has been said by Lord Selborne in *Duncan Fox and Co.* v. *North and South Wales Bank*[2]—indeed he seems to think that the case has been wrongly reported. He then quotes the following passage from Lord Hatherley's judgment in *Hobson* v. *Bass*[3]:

> "If a person guarantees a limited portion of a debt, all the authorities show that if he pays that portion of the debt he has in respect of it all the rights of a creditor; "

and explains it away by stating that it means that the rights of the creditor referred to were his rights against the principal debtor or his estate in bankruptcy and not all the rights of the creditor whose debt he guarantees. This comment is, if we may say so respectfully, not justified either by the decision itself or by the earlier cases referred to by Lord Hatherley in his judgment. The substance of the reasoning of Farran, J., is, we think, really to be found in the following passages occurring at page 64 of the report:

> "It seems to me to be a strange doctrine that a creditor, not fully secured by a mortgage, who obtains the benefit of a surety for part of his mortgage debt in order to further secure himself, by that very act is deprived of portion of the security the inadequacy of which was a reason for demanding the surety; or that a person advancing, say, Rs. 10,000 on a mortgage, which is valued only at Rs. 5,000 and has Rs. 5,000 of his advance guaranteed by a surety, is only in reality secured to the extent of Rs. 7,500 by reason of the surety's right to claim the benefit of half the mortgage security on paying his half of the debt. To hold so would, I think, defeat the intention of the parties to such a transaction. A principle of equity is seldom adopted, which has that effect."

With respect again the learned Judge here seems entirely to miss the principle involved in the decisions of the English Courts which is that the security held by the creditor as cover for a debt attaches to every rupee of the debt and if he chooses to accept the guarantee with respect to part only of the debt the surety on payment of that part is by force of law entitled to a proportionate part of the security. There is nothing to prevent a creditor for stipulating and obtaining a guarantee for the whole debt and there is nothing again against the surety waiving the right to which he is entitled under law. In the absence however of any such arrangement or waiver the law must prevail. We are unable to see how it can be said that the surety's claim is inequitable. On the contrary, the English decisions appear to our mind to make it inequitable for the creditor to defeat the rights of the surety who pays the debt by making an appropriation to his own advantage and to the detriment of the surety. In *C. L. Phillips* v. *A. E. Mitchell*[4], it appears that the creditor had advanced to the debtor a loan of Rs. 40 lakhs on a guarantee given by three individuals. Although the guarantee was in respect of the whole debt the liability of the sureties was limited to a maximum of Rs. 18 lakhs. The creditor also had a mortgage given to him as cover for the debt. The debt not

1. (1874) 22 W.R. 312.
2. (1880) 6 A.C. 1.
3. (1871) 6 Ch.Ap. 792.
4. (1929) I.L.R. 57 Cal. 764.

having been paid on demand, the creditor after giving notice instituted a suit against the sureties. The sureties pleaded that until the mortgage was realised the creditor was not entitled to sue. The question turned on the construction of the instrument of guarantee. The Court held that the claim against the sureties could not be enforced except for the balance remaining due after realising the security, limited to the maximum amount of their liability. The security not having been realised, the suit was dismissed as premature. On appeal to the Privy Council in *A. E. Mitchell* v. *C. L. Phillips*[1], their Lordships reversed the decision of the High Court holding that upon the true construction of the guarantee the liability of the sureties was not restricted to the deficiency after the realisation of the mortgage and that they were liable for the amounts claimed even though the mortgage had not been realised. Referring to the form of the guarantee their Lordships observed that a contract was there drawn between (1) the whole of what may eventually become due from the principal debtor for principal and interest, and (2) a part of the total debt co-extensive with the guarantor's maximum liability. This indeed, it will be observed, is the distinction which has been throughout drawn in the English cases to which we have adverted. Their Lordships expressed the opinion that the case fell under the former and not under the latter class and that the sureties were accordingly liable. It is important in this connection to note that their Lordships while stating that it was unnecessary for them to express an opinion as to what would be the rights of the sureties in respect of the mortgage after their liability under the guarantee had been discharged uttered a warning that they must not be taken to approve the statement of Ghose, J., in the judgment under appeal, namely,

> "not until the sureties in the present case have paid off the entirety of the mortgage debt due to Stephen, would they be entitled to the securities which Stephen held, that is, even if the sureties paid off a sum of Rs. 18 lakhs, they would not be entitled to the said securities until the balance of forty lakhs was realised. The sureties would, in such a case, be without any security whatsoever during the interval."

In this passage there is, of course, no express decision, but there is a sufficiently clear indication that the rights of the surety even if he is a surety for the whole debt but with a limited liability required careful consideration before it can be held that they had no security whatever before payment of the debt.

The result of the discussion on a careful consideration of the decided cases is that a surety for a part only of a debt is on payment of that part entitled *pro tanto* to the security held by the creditor as cover for the debt as a whole.

Before concluding we may refer to one other argument advanced by learned counsel for the respondents based upon section 92 of the Transfer of Property Act which embodies the rule of subrogation. Section 91 enumerates the persons who besides the mortgagor are entitled to redeem or institute a suit for redemption of the mortgaged property. Section 92 goes on to state :

> "Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee."

The last clause of the section is,

> "Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full."

It is clear on a reading of the section that the right of subrogation recognised by it is not available until the mortgage is redeemed in full. But we have here no question of the redemption of a mortgage. Indeed, the appellant Bhushayya is not among the persons enumerated in section 91 on whom alone section 92 confers the right of subrogation. He is not a surety for the payment of the mortgage debt or any part thereof. The mortgage security was, as we have already pointed out, given by the principal debtors to the creditor by way of additional security. We are clearly of opinion that section 92 is wholly inapplicable to the present case.

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1. (1931) 61 M.L.J. 191 : L.R. 58 I.A. 306 : I.L.R. 59 Cal. 320 (P.C.).

The result is the appeal must be and is hereby allowed. The appellant is declared entitled to a share in the mortgage security represented by the deed, Ex. H, dated 15th April, 1931, in the proportion which the debt discharged by him bore to the other two debts now vested in Hanumara Venkayya. The Court below will pass a preliminary mortgage decree for sale of the hypotheca; the appellant being entitled to the share of the proceeds specified above. Time for redemption shall be fixed at three months. The appellant is entitled to his costs of the appeal and of the suit from the respondents.

The question whether the respondents are entitled to have the debt scaled down under the Madras Agriculturists' Relief Act has not been gone into by the learned Subordinate Judge. This question will now be decided and the result incorporated in the preliminary decree. The suit is remanded to the lower Court which will proceed to dispose of it in the light of the findings and observations contained in this judgment.

B.V.V. —— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING AND MR. JUSTICE SHAHABUDDIN.

Muniandi Servai .. *Prisoner.**

*Penal Code (XLV of 1860), section 300, Exception 4—Applicability—Blow with rice-pounder during exchange of abuse—Death caused—Conviction for murder—Sustainability.*

Where during an exchange of abuse, the accused hit the deceased with a deadly weapon—a rice-pounder—which caused her death, but there was nothing in the evidence to show that he had a motive in killing the deceased and equally there was no doubt that he intended to inflict the injury and that he must have known that such an injury was sufficient to cause death in the ordinary course of nature,

*Held*, that in the circumstances of the case, the act amounted to the offence of murder punishable with sentence of death.

*Held, further*, that it cannot be said that in every case of death resulting from a single blow dealt in heat of passion, the offence is not murder.

*Emperor* v. *Sardarkhan Jaridkhan*, (1916) I.L.R. 41 Bom. 27, not followed.

Trial referred by the Court of Session of the Ramnad Division of Madura for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 71 of 1943 on 6th September, 1943, and appeal by the said prisoner against the said sentence of death.

*K. Veerasami* for Accused.

The Assistant Public Prosecutor for the Crown.

The Judgment of the Court was delivered by

*Shahabuddin, J.*—The appellant Muniandi Servai has been convicted and sentenced to death by the learned Sessions Judge of Ramnad for the murder of one Kayambu Ammal. With the appellant, his cousin the first accused was tried for the abetment of this murder; but the learned Sessions Judge convicted him of the abetment of causing hurt and sentenced him to a fine. We are concerned in this case only with the appellant the second accused before the trial Court.

The case for the prosecution is that on the 26th May last, at about 11-30 A.M., the deceased Kayambu Ammal who was living in the house opposite to that of the first accused, close to which the appellant was living, came along the street leading the bulls of the first accused abusing him because they had grazed in her paddy fields. The first accused thereupon asked the deceased in abusive language not to drive the bulls which she was taking to the pound, and the deceased abused him. At that stage the appellant interfered and the first accused asked him to beat and kill the deceased. The appellant thereupon picking up a rice-pounder hit her on the head as a result of which she fell down and died a few hours later. As soon as the deceased fell down, P. W. 5 picking up a stick hit the appellant on the head. Both the appellant and the first accused then ran away. The deceased was then taken in a cart to Ramnad hospital. All the eye-witnesses except P. W. 11

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* R. T. No. 186 of 1943. 2nd November, 1943.
(Crl. App. No. 654 of 1943).

accompanied her. They reached the hospital but before the deceased could be carried into the hospital she died.

No information of this occurrence was given to the village munsiff but the Sub-Inspector having had vague information about this occurrence went to the village and from there to the hospital where he found all the eye-witnesses except P. W. 11. He recorded the first information from P. W. 5. *Post-mortem* disclosed a comminuted depressed fracture of the left parietal bone as well as the base of the skull and death was due to this extensive fracture. The case of the appellant before the committing Magistrate and the learned Sessions Judge was that he and other villagers had petitioned against one Sundararajan Servai and the eye-witnesses had falsely implicated him at the instance of that Sundararajan Servai. The appellant was absconding and when arrested on the 30th of May had an injury on the head.

The learned Sessions Judge accepted the evidence of the eye-witnesses as true, and we agree with him. There can be no doubt that the fatal blow was dealt by the appellant as stated by the eye-witnesses. Their evidence is consistent in this respect and we have not been shown any reason for disbelieving them. On the other hand learned counsel appearing for the appellant admits that he cannot challenge their evidence. But his contention is that the act of the appellant does not amount to the offence of murder. He argues that exception 4 to section 300, Indian Penal Code, applies and that in any case having regard to the utter lack of motive for the appellant to kill the deceased he cannot be said to have intended to kill her or to inflict the injury which was in fact inflicted. In support of this latter argument he has drawn our attention to the decision of the Bombay High Court in *Emperor* v. *Sardarkhan Jaridkhan*[1]. We are unable to accept either of these contentions. Exception 4 obviously does not apply to the facts of this case. There was no fight between the appellant and the deceased. There was only an exchange of abuse and the appellant in picking up the rice-pounder and hitting the deceased with such force as to cause an extensive fracture of the skull did take undue advantage and acted in a cruel and unusual manner. It is no doubt true that there is nothing in the evidence to show that the appellant had a motive to kill the deceased, but it cannot be said that the appellant while hitting the deceased with a rice-pounder which, in our opinion, is a deadly weapon, did not intend to cause the injury which led to her death. Even if it is considered that he had no intention to kill, there can be no doubt that he intended to inflict the injury which he actually inflicted ; and he must have known that such an injury is sufficient in the ordinary course of nature to cause death. The observations in *Emperor* v. *Sardarkhan Jaridkhan*[1] relied on by learned counsel for the appellant appear to us to apply to the special circumstances of that case where the weapon of offence was a ferruled stick which is used ordinarily in every day life. However, if that decision is an authority for the position that in every case of death resulting from a single blow dealt in heat of passion, the offence is not murder, we respectfully disagree. In the circumstances of this case we have no doubt that the appellant's act amounts to the offence of murder. We therefore confirm the conviction and also the sentence of death which in our opinion is the only appropriate sentence having regard to the injury inflicted and the weapon used. The appeal is dismissed.

K.C. *Appeal dismissed.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

K. Vasudevan .. *Petitioner in both.**

*Practice—Review—Grounds—Madras Agriculturists' Relief Act (IV of 1938)—Amending Act having retrospective effect—No ground for reviewing order of High Court already passed on the basis of the law as it then stood.*

The passing of the Madras Agriculturists' Relief (Amending) Act, even though it changes the law with retrospective effect, is not a sufficient reason for reopening matters which have already been decided on the basis of the law as it stood before the amendment.

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1. (1916) I.L.R. 41 Bom. 27.

* C. M. Ps. Nos. 4416 and 4600 of 1943. 1st December, 1943.

Petition praying that in the circumstances stated in the affidavit filed with C. M. P. No. 4600 of 1943 on the file of the High Court, the High Court will be pleased to excuse the delay in filing the application S. R. No. 25100 of 1943 for review of the order dated 14th August, 1942 and made in C. R. P. No. 318 of 1942 on the file of the High Court.

*K. Rajah Aiyar* for *R. Rangachariar* for Petitioner.

The Court made the following

ORDER.—It seems to us clear that the passing of the Amending Act, even though it changes the law with retrospective effect, is not a sufficient reason for re-opening matters which have already been decided on the basis of the law as it stood before the amendment. The petition to excuse delay and the petition for review are therefore dismissed.

K.S. ——— *Petitions dismissed*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

The Public Prosecutor .. *Appellant**

*v.*

Narayana Sing .. *Respondent.*

*Madras Prevention of Adulteration Act (III of 1918), section 5 (1)* (b)—*Rules 29* (b) *and 27—Adulteration of milk with water—Purchase of milk by Sanitary Inspector—Purchase proved—Whether offence under the circumstances.*

Where the accused was offering milk for sale and the complainant, the Sanitary Inspector, purchased milk for two annas, had the milk tested by an analyst and finding from his report that it was adulterated with water, charged the accused under rule 29 (*b*) of the rules under the Madras Prevention of Adulteration Act, section 5 (1) (*b*) read with rule 27,

*Held*, that the purchase having been proved, the fact that the purchaser happened to be a Sanitary Inspector would not make it any the less a purchase and the accused was guilty of an offence punishable under rule 29 (*a*) of section 5 (1) (*b*) of the Act.

In re *Ballamkonda Kanakayya*, (1942) 2 M.L.J. 172 : I.L.R. (1943) Mad. 381, explained.

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid accused by the Stationary Sub-Magistrate of Anantapur in C. C. No. 449 of 1943 on his file.

The Public Prosecutor (*V. L. Ethiraj*) in person.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This is an appeal by the Crown against the acquittal of the accused in C. C. No. 449 of 1943 on the file of the Stationary Sub-Magistrate of Anantapur. He was charged under rule 29 (*b*) of the rules framed under the Madras Prevention of Adulteration Act and section 5 (1) (*b*) of the said Act read with rule 27. The case against the accused was that he was selling milk adulterated with water on the 28th of March last. The Sanitary Inspector found him offering milk for sale. He purchased from him milk for two annas with a view to test it. He tested the milk and found that it was adulterated with water. He made samples of it and gave a declaration to the accused and sent a report. P. W. 1, the Sanitary Inspector, proved the purchase by him for two annas of the milk which the accused was offering for sale. He took out of it three samples and sent one to the Chemical analyst. The analyst's report showed that the sample milk sent to him contained 46 per cent. water. The Magistrate held that since the Sanitary Inspector took out the samples in his official capacity the accused could not be found guilty and he relied upon the decision of Mr. Justice Horwill, in In re *Ballamkonda Kanakayya*[1]. The Magistrate has evidently not correctly understood that ruling. All that was stated there was that there must be proof that the accused sold the milk. In that particular case there was no proof of sale and the evidence disclosed that the Sanitary Inspector seized a part of the milk and sent it to the analyst. The accused could not be found guilty as there was no evidence of sale. In this case, there is the evidence of the Sanitary Inspector that he purchased milk for two annas and that after purchasing

* Cr. App. No. 632 of 1943. 26th November, 1943.

1. (1942) 2 M.L.J. 172 : I.L.R. (1943) Mad. 381.

the same he noticed that it was adulterated and then took out a sample and forwarded it to the authorities. The ruling has therefore no application to the facts of this case. It was pointed out even in that ruling that if the Sanitary Inspector had purchased it the accused would have been guilty of the offence. The fact that the purchaser in this case happened to be the Sanitary Inspector would not make it any the less a purchase. The order of acquittal is therefore set aside.

There is no evidence to show that the accused had any previous conviction. The accused will have to be convicted for an offence punishable under rule 29 (*a*). I therefore convict the accused under rule 29 (*a*) and section 5 (1) (*b*) of the Act mentioned above read with rule 27 of the rules framed under that Act and sentence him to pay a fine of Rs. 5 with simple imprisonment in default for one week.

K.C. ——— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

M. M. Abdul Khader .. *Petitioner**

*v.*

Azeeza Bee .. *Respondent.*

*Mahomedan Law—Marriage—Divorce—Thalak communication to wife—Claim for maintenance till knowledge of thalak—Maintainability.*

A thalak if it is executed in the presence of a Khazi and attested by witnesses, though not communicated to the wife would be a valid divorce. But it would come into operation only from the date on which the wife comes to know of it. Consequently the wife is entitled to claim maintenance till the date when the thalak was communicated to her.

*Sarabai* v. *Rahia Bai*, (1905) I.L.R. 30 Bom. 537 and *Kathiyumma* v. *Urathel Marakkar*, A.I.R. 1931 Mad. 647, relied on.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Third Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras, dated 31st May, 1943, and passed in M. P. No. 102 of 1943.

*P. S. Ramamurthy* and *T. Ramaprasada Rao* for Petitioner.

*S. Ramaswami Aiyangar* and *Md. Salahuddin* for Respondent.

The Court made the following

ORDER.—The petitioner is the counter-petitioner in M. P. No. 102 of 1943 on the file of the Third Presidency Magistrate, Madras, filed by his wife for recovering maintenance from him. The case of the petitioner before the lower Court was that she was the lawfully wedded wife of the counter-petitioner, that they were living as husband and wife for two and a half years and that her husband has neglected and failed to maintain her and that she was entitled to be maintained by him. His plea was that she had been divorced by him. There was a thalaknama executed in the presence of a Khazi attested by two witnesses. The Magistrate found that it was not a valid divorce because it has not been communicated to the wife. It was pointed out even in the very ruling relied on by him, namely, *Kathiyumma* v. *Urathel Marakkar*[1] that there could be a valid thalak in the absence of the wife but it would come into operation only from the date on which the wife comes to know of it. In *Sarabai* v. *Rahia Bai*[2], it was pointed out that a thalak if it is executed in the presence of a Khazi and attested by witnesses, though not communicated to the wife, would be a valid one. Even in the passage from Ameer Ali's Book referred to in *Kathiyumma* v. *Urathel Marakkar*[1], it is stated that there could be a valid thalak given by a husband in the absence of the wife. But all that has been stated is that it must be communicated to the wife before it could be acted upon. In this case there is the evidence of the wife who examined herself as P. W. 1 that she was told by the Sub-Inspector that her husband had given a thalak. As a matter of fact the husband's case was that even at the time he granted the thalak the wife's uncle, R. W. 3 was present and that he even signed the thalak-

* Cr. R. C. No. 601 of 1943. (Cr. R. P. No. 543 of 1943). 15th October, 1943.

1. A.I.R. 1931 Mad. 647. 2. (1905) I.L.R. 30 Bom. 537.

nama as father of the girl. P. W. 1 herself stated that she married her husband against her father's wishes and on the advice of this uncle. It was therefore thought enough if the uncle was present at the time of the execution of the thalak and his signature taken. Whatever it be, there is the definite admission of P. W. 1 that she came to know of the thalaknama from the Sub-Inspector before she was examined, which was on 5th May, 1943. So at any rate from the date on which the Sub-Inspector informed her the divorce had come into effect. The wife will therefore not be entitled to maintenance at any rate after 5th May, 1943, as she came to know of the thalak before that date. The order will be modified by directing the husband to pay the respondent a monthly maintenance of Rs. 6 only from 22nd February, 1943, till 5th May, 1943, as the records do not indicate on what date the Sub-Inspector informed her and admittedly she was informed before 5th May, 1943.

B.V.V. ——— *Order modified.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Neroth Puthenpura Kunhikannan .. *Appellant**

*v.*

Pulappati Achu and others .. *Respondents.*

*Malabar Tenancy Act (XIV of 1930), section 41—Rent due to landholder—Transfer of right to rent—Whether rent continues to be a charge on the land in the hands of the assignee.*

Where the question arose whether an assignee from a landlord of his right to rent can enforce the rent as a charge on the interest of the tenant in the land, under the Malabar Tenancy Act,

*Held*, that once the charge for rent has attached itself to the land on the rent becoming due, it cannot be taken away because the landlord subsequently transferred his right to collect rent to another.

*Swaminatha Aiyar* v. *Ramanatha Aiyar*, (1943) 2 M.L.J. 24, followed.

Appeal against the decree of the Court of the Subordinate Judge of Tellicherry in A. S. No. 185 of 1942 preferred against the decree of the District Munsiff of Kuthuparamba in O. S. No. 511 of 1940.

*K. Kuttikrishna Menon* for Appellant.

*P. Govinda Menon* and *P. Chandrasekhara Menon* for Respondents.

The Court delivered the following

JUDGMENT.—A landlord to whom rent was due transferred his right to the rent by Ex. B. The question that arises in this second appeal is whether the assignee can enforce the rent as a charge on the interest of the tenant in the land. It is not denied that if the respondent had been a landlord his suit would have been in time, because of the charge referred to in section 41 of the Malabar Tenancy Act. The question is whether the assignee has an equal right.

Section 41, reads,

"... . arrears of michavaram or rent due to the landlord together with interest, if any, payable on the same shall be a charge on the interest of the person from whom they are due in the holding . . . . ".

It would seem from this section that the charge attached itself to the land as soon as the rent was due. If that is so, then a transfer of the right to collect rent would transfer the charge also. It is difficult to see how, when once the charge has attached itself to the land, it becomes disattached because the landlord subsequently transfers his right to collect the rent to some other person.

Fortunately, it is not necessary for me to discuss this question at any great length, because precisely the same question has been considered by my learned brother, Somayya, J., in *Swaminatha Aiyar* v. *Ramanatha Iyer*[1]. Two decisions on which the learned advocate for the appellant relies to defeat the claim of the transferee of the rent are *Vyraperumal* v. *Alagappa*[2] and *Forbes* v. *Maharaja Bahadur Singh*[3]. In the former case, this question did not arise, because the suit was one for contribution, but during the course of his judgment, Krishnan Pandalai, J., with reference to a somewhat similar provision in section 5 of the Madras Estates Land Act, said :

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* S. A. No. 1421 of 1942. 29th October, 1943.

1. (1943) 2 M.L. J. 97.
2. (1931) I.L.R. 55 Mad. 468.
3. (1914) 21 M.L.J. 4 : L.R. 41 I.A. 96 : I.L.R. 41 Cal. 228 (P.C.).

"What section 5 declares in effect is that, subject to any right of Government, the rent of ryoti land shall be a first charge on the holding and on the produce of the holding or any part thereof. That is a charge created for the benefit of the landholder and applies to rent only so long as it is due to him, in that character; *Forbes* v. *Maharaja Bahadur Singh*[1].

The question whether an assignee could rely upon the charge was not at all discussed; and the question did not arise in that litigation. The similarities and differences between the wording of the relevant sections of the Madras Estates Land Act and the Bengal Tenancy Act were not referred to. Somayya, J., has pointed out that difference in his judgment. In *Forbes* v. *Maharaja Bahadur Singh*[1] their Lordships had to deal with the provisions of the Bengal Tenancy Act, which are very different from those in the Madras Estates Land Act or in the Malabar Tenancy Act. One very important provision in section 148 (*o*) of the Bengal Tenancy Act has no equivalent in the Malabar Tenancy Act—or even in the Madras Estates Land Act for that matter. I respectfully agree with Somayya, J., in the case above quoted.

The appeal is dismissed with costs.

K.C. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Jashi Parvathavardhanamma .. *Appellant**

*v.*

Adusumalli Venkataramiah and others .. *Respondents.*

*Provincial Insolvency Act (V of 1920), section 53—Insolvent and his sons executing mortgage deed—Creditor's application to set aside deed—Jurisdiction of Insolvency Court to go into merits regarding sons' liability.*

A creditor in insolvency appealed against an order refusing to set aside a mortgage deed executed by the insolvent and his sons, so far as the document related to the transfer by the sons of the insolvent, on the ground that there was an attachment of the sons' interest.

*Held*, that apart from the question as to whether an attachment of the sons' interest at the instance of a creditor would deprive the Official Receiver of his right to bring the properties for sale by exercising the power vested in the father to sell the interest of the sons in the joint family properties for a debt of the father, the Inoslvency Court had no jurisdiction to set aside under section 53 of the Provincial Insolvency Act the document so far as it was executed by the sons or on behalf of the sons by the father as guardian.

*Virupaksha Reddy* v. *Chanalal Siva Reddi*, (1943) 2 M.L.J. 87, applied.

*Murugappa Mudali* v. *Official Receiver, Chittoor*, (1943) 1 M.L.J. 24, not followed.

Appeal against the order of the District Court of West Godavari at Ellore dated 5th February, 1942 and in C. M. P. No. 342 of 1938 in I. P. No. 4 of 1932.

*A. Lakshmayya* for Appellant.

*M. S. Ramachandra Rao, D. Munikanniah, N. R. Amirthalingam, B. Srinivasamurthi* and *P. V. Vallabhacharyulu*, for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by a creditor in insolvency against the order of the District Judge of Ellore refusing to set aside a mortgage deed executed by the insolvent and his sons so far as the document related to a transfer by the sons of the insolvent. Ex. 11 is the mortgage deed executed by Somayya the insolvent and his sons Venkateswara Rao and Venkata Subrahmanyam, represented by the father as guardian. The Official Receiver filed the petitions C. M. P. No. 342 of 1938 under section 53 of the Provincial Insolvency Act for setting aside that mortgage. The document was set aside only so far as it was executed by the father but so far as the execution of the document by the sons was concerned, the learned Judge came to the conclusion that it could not be set aside as there was an attachment in respect of the sons' interest. The appellant has filed this appeal after obtaining leave of Court under section 73 (5) of the Provincial Insolvency Act.

1. (1914) 27 M.L.J. 4: L.R. 41 I.A. 91 : I.L.R. 41 Cal. 126 (P.C.).

* A. A. O. No. 554 of 1942. 10th November, 1943.

When the appeal was taken up for hearing, it was stated by Mr. Munikanniah for the third respondent and by Mr. Vallabhacharyulu for the fourth respondent that they are entitled to go into the merits of the order of the District Judge, that they are not in a position to do so as the entire records have not been printed and that they were told that this is a case in which the parties are to file typed papers as printing had been dispensed with and it is only after the case came in the ready list they noticed that the papers had been printed at the instance of the appellant. I mentioned to them that in case that has to be gone into I would give them an opportunity to get the necessary documents typed and put into Court.

The only question argued before me is whether the insolvency Court had jurisdiction to go into the question as to whether the document Ex. 11 could be set aside so far as it was executed by the sons. Under section 53 of the Provincial Insolvency Act,

> " any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent (on a petition presented) within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court."

The Insolvency Court being a Court of special jurisdiction constituted under the Provincial Insolvency Act its jurisdiction and powers would be limited to and governed by the provisions of that Act. Under section 53 of the Act, a transfer could be set aside by the Insolvency Court only " if the transferor is adjudged insolvent." In this case, it is the father that was adjudged insolvent and not the sons. The sons being *eo-nominee* parties to Ex. 11 and not having been adjudged as insolvents, the transfer under that document cannot be set aside so far as it related to them. In *Subramaniam Chettiar* v. *Subbaraya Goundan*[1], it was held by Sundaram Chetti, J., that the Insolvency Court had no jurisdiction to set aside the alienation so far as the son of a Hindu insolvent was concerned. It is true that in *Palaniappa Chettiar* v. *Official Receiver, Madura*[2] as also in *Murugappa Mudali* v. *Official Receiver, Chittoor*[3], that decision of Sundaram Chetti, J., has been dissented from. But then, in *Palaniappa Chetti* v. *Official Receiver, Madura*[2], the question has not been considered by Pandrang Row, J., in the light in which I have put it. It was stated in that ruling that as the father himself could convey the entire interest of the family in the property by an alienation the document would convey the entire interest in the property and hence could be set aside. But the question as to whether the conditions imposed by section 53 of the Act could be said to have been fulfilled in a case like this was not dealt with by the learned Judge. Similarly in the other case *Murugappa Mudali* v. *Official Receiver, Chittoor*[3], the reason given by Abdur Rahman, J., was that the son's interest vests in the Official Receiver when the Hindu father is adjudged insolvent. In *Virupaksha Reddi* v. *Chanalal Siva Reddi*[4], it was pointed out by a Bench of this Court that this view was not correct. In view of the fact that the basis for the decision in *Murugappa Mudali* v. *Official Receiver, Chittoor*, has not been approved by a decision of the Bench of this Court, I do not think I will be justified in following it.

In these circumstances, I find that apart from the question as to whether an attachment of the son's interest at the instance of a creditor would deprive the Official Receiver of his right to bring the properties for sale by exercising the power vested in the father to sell the interest of the sons in the joint family properties for a debt of the father, the Insolvency Court had no jurisdiction to set aside under section 53 of the Provincial Insolvency Act the document so far as it was executed by the sons or on behalf of the sons by the father as guardian.

In the result, the appeal fails and is dismissed with costs of respondents 3 and 4.

K.C. ——— *Appeal dismissed.*

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1. A.I.R. 1935 Mad. 246.
2. (1937) 2 M.L.J. 427.
3. (1943) 1 M.L.J. 24.
4. (1943) 2 M.L.J. 87.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Vahidunnissa Saheb .. *Petitioner**

*v.*

Mohammad Mahaboob Ali and others .. *Respondents.*

*Madras Debt Conciliation Act (XI of 1936), section 25—Scope—Dissolution of Board to which application or conciliation had been made—If ground for refusing stay of execution.*

Under section 25 of the Madras Debt Conciliation Act stay of execution proceedings against a debtor cannot be refused on the ground that the Board to which an application for conciliation was made had been dissolved. It is not until an application to the Board has been dismissed that execution can be allowed to proceed. The dissolution of the Board cannot operate as a dismissal or disposal of an application pending before it, though there may be an interregnum between the dissolution of the Board and the constitution of a fresh Board as provided by section 3 (5) of the Act, during which pending applications are held up.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Kovvur dated 5th January, 1943, and made in E. A. No. 1739 of 1942 in O. S. No. 201 of 1937.

*M. Appalachariar* and *K. V. Rangachariar* for Petitioner.

*V. Parthasarathy* for Respondents.

The Court delivered the following

JUDGMENT.—The facts giving rise to this revision petition are that after the presentation of an application under section 4 of the Madras Debt Conciliation Act the Board was dissolved. Although the application under section 4 had not then been disposed of, the learned District Munsif held that there was no application pending before a legally constituted Board and therefore section 25 of the Act ceased to operate. He accordingly refused to allow stay of execution.

When once an application has been made under section 4 of the Act, all execution proceedings are automatically stayed under section 25, which enacts that execution or other proceedings shall not be proceeded with until the Board has dismissed the application. Therefore, the only way in which the ban under section 25 on execution can be lifted is by the dismissal of the application under section 4. It is obvious that the dissolution of the Board cannot operate as a dismissal of the application in the absence of any statutory provision to that effect. Section 3 (5) of the Act provides for the establishment of another Board and this has, in fact, been done. The petitioner's learned advocate has exhibited a copy of G. O. No. 3116 (Development Department) dated January 25, 1943 re-constituting this and numerous other Boards under section 5. It may be that in the interval between the dissolution of the Board and the constitution of a fresh Board there is an interregnum during which pending applications under section 4 are held up, but in view of the clear wording of section 25 there is no room for the contention that the petition must be deemed to have been disposed of with the dissolution of the Board. It is not until the pending application has been dismissed that execution can be allowed to proceed and the learned District Munsif had no jurisdiction to refuse to allow stay. In the result, this petition is allowed, the order of the learned District Munsif is set aside and stay of execution is ordered to continue, subject to any orders which may, in the meanwhile, have been passed by the newly constituted Board. The petitioner will have his costs.

K.S. —— *Petition allowed.*

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* C. R. P. No. 128 of 1943. 21st September, 1943.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Muna Pona Muthupalani Chetty .. *Petitioner**

*v.*

Suppiah Ambalam and others .. *Respondents.*

*Madras Debt Conciliation Act (XI of 1936), section 25—Return for amendment of defects in application made by debtor under section 4—Sale in execution held between the return and re-presentation—Validity.*

An application for conciliation must be deemed to have been made only when it is made in accordance with the statutory requirements of sections 4, 5 and 6 of the Debt Conciliation Act. Where the Board, instead of following the mandatory provisions of section 7 of the Act, returns an application which is defective in material particulars for amendment, the debtor is not entitled to a stay of execution proceedings under section 25 ; if a sale is held in the interval between the return of the application and its re-presentation, there is no irregularity.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Melur dated 3rd November, 1942 and made in E. A. No. 566 of 1942 in E. P. No. 257 of 1941 in O. S. No. 214 of 1930.

*T. L. Venkatarama Aiyar* for Petitioner.

*T. S. Vaidyanatha Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner challenges the jurisdiction of the executing Court to sell his property in execution of the decree against him, his objection being that he had already made an application for the settlement of his debts under section 4 of the Madras Debt Conciliation Act and, therefore, under section 25 of the Act the executing Court was powerless to proceed further until that application had been dismissed. The sale proceedings were once adjourned but on the adjourned date it transpired that the application made to the Board was defective in material particulars. The Board, instead of following the mandatory provisions of section 7 of the Act, chose to return the application for amendment. It was in the interval between this return and its re-presentation that the sale was held and the learned District Munsif took the view that the order directing the return of the application for amendment was equivalent to an order of rejection under section 7 of the Act. It is possible also to take another view, namely, that because the application did not contain the statutory particulars under section 6 of the Act, it was not an application within the meaning of section 4 read with sections 5 and 6 of the Act and consequently gave the debtor no protection under section 25. The learned advocate for the decree-holder relies on the decision in *Seshamma* v. *The Debt Conciliation Board, Nandyal*[1], in which the Chief Justice and Kuppuswami Ayyar, J., held that where a defective application was returned for the rectification of certain defects and subsequently re-presented, the period of one year under section 17 of the Act runs not from the date of its original presentation but from the date when it was re-presented in its correct form. This means that an application must be deemed to have been made when it is made in accordance with the statutory requirements of sections 4, 5 and 6. In this view of the matter it follows that the petitioner's application was not an application within the meaning of the Act, and, therefore, he was not entitled to a stay of proceedings under section 25. There was no irregularity in the sale and this petition is ordered to be dismissed with costs.

K.S. ——— *Petition dismissed.*

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* C. R. P. No. 1764 of 1942. 8th November, 1943.

1. (1942) 1 M.L.J. 370.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Bhavadasan Nambudiripad .. *Appellant**

*v.*

Narayanan Nambudiripad .. *Respondent.*

*Malabar Tenancy Act (XIV of 1930), section 25—Ejectment suit—Interlocutory application by tenant for execution of renewal deed of* kanom—*Order for deposit of renewal fee with interest from 1st December, 1930—Deposit under protest and dismissal of ejectment suit—Tenant's right to appeal against order in interlocutory application—Renewed lease—Commencement—Interest on renewal fee—Liability for—Starting point.*

A jenmi filed a suit for ejecting his kanom tenant. The latter filed a petition in the suit under the Malabar Tenancy Act for a renewal being granted in respect of the kanom as the jenmi did not *bona fide* require the land for his cultivation. The tenant was called upon to pay the renewal fee with interest thereon at twelve per cent. from 1st December, 1930, (the date on which the Malabar Tenancy Act came into force). It was also ordered that the renewal will be for twelve years from the 1st December, 1930. The tenant deposited the amount, though under protest and the ejectment suit was consequently dismissed. On second appeal by the tenant,

*Held*, that as a person aggrieved by the order directing a particular amount to be deposited, the tenant has a right of appeal and that appeal will be an appeal against an order passed under section 25 of the Malabar Tenancy Act. The renewal deed will be a renewal of the lease for twelve years from the date on which the document was executed and not from the 1st December, 1930. As the renewal takes effect only from the date of the document and not from the date of the commencement of the Malabar Tenancy Act, interest on the renewal fee is payable only from the date of the document. Where the renewal fee is deposited before the document fee is executed no interest will be due.

Appeals against the decree of the Court of the Subordinate Judge of Ottapalam dated 29th December, 1942, and passed in A. S. No. 107 of 1942 preferred against the order of the Court o. the District Munsif o. Walluvanad in I. A. No. 2146 of 1941 in O. S. No. 98 of 1941, etc.

*D. H. Nambudripad* for Appellant.

*N. R. Sesha Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—These appeals arise out of a suit filed by a landlord for ejecting his tenant who was holding the properties on kanom tenure. Under the terms of the Malabar Tenancy Act the kanom tenant filed a petition for a renewal being granted in respect of the kanom as it was found that the jenmi did not *bona fide* require the land for his cultivation. The suit was O. S. No. 98 of 1941 on the file of the District Munsif of Walluvanad, and I. A. No. 2146 of 1941 was the petition filed by the tenant praying for the execution of a renewal in respect of the kanom. A Commissioner was appointed to ascertain the renewal fee payable by the tenant and he submitted a report fixing it. There was no objection to the amount fixed by him and on the basis of his report the District Munsif passed an order calling upon the tenant to pay the renewal fee with interest thereon at twelve per cent. from 1st December, 1930, the date on which the Malabar Tenancy Act came into force and he also ordered that the renewal will be for a period of twelve years from 1st December, 1930. The amount due as arrears of rent in respect of the kanom was also ascertained and the same also was directed to be deposited along with the renewal fee and the interest thereon. Though he objected to pay the amounts fixed as interest on the renewal fee from 1st December, 1930, and also the price of paddy fixed by the Court for arriving at the amount due as arrears of michavaram, he deposited the amount under protest and thereupon the District Munsif dismissed the suit holding that by reason of his order directing the grant of a renewal the jenmi will not be entitled to a decree in eviction. As the amount payable by way of michavaram and renewal fee together with interest thereon had been deposited, he had no other course but to dismiss the suit; but he directed the tenant to pay the costs of the suit. The tenant thereupon filed two appeals, A.S. Nos. 107 and 117 of 1942 on the file of the Subordinate Judge's Court of Ottapalam. One was against the order in I. A. No. 2146 of 1941 and the other against the decree in O.S. No. 98 of 1944. With regard to the appeal against the order on the interlocutory application the main objection that appears to have been pressed was that he was not liable to pay interest on the renewal fee from 1st December, 1930. In the other appeal he pleaded discharge of the rent and also pleaded

* A. A. Os. Nos. 260, 261, 396 and 397 of 1943. 27th October, 1943.

that the price of paddy was incorrectly fixed. The learned Subordinate Judge found that the price of paddy fixed by the first Court was incorrect as it was not the gazette rate but the market rate and he directed it to be fixed at the gazette rate. As the modification in the price of the paddy would alter the amount of michavaram payable by the tenant the Subordinate Judge allowed both the appeals and remanded the petition and suit for passing orders in the light of the price fixed by him with regard to the paddy rent payable. It is as against these orders the jenmi has filed A. A. O. Nos. 396 and 397 of 1943. The tenant has also filed appeals against the order refusing to allow his contention that interest was not payable by him on the renewal fees from 1st December, 1930, and also complaining that he was entitled to have a renewal for twelve years from the date of the document and not merely from 1st December, 1930, as was found by the first Court, though he did not challenge the correctness of this in the appeal by him against the order on I. A. No. 2146 of 1941. The two appeals filed by him are C. M. A. Nos. 260 and 261 of 1943.

It is contended for the jenmi that no appeal lay against the order on the interlocutory application, I. A. No. 2146 of 1941, in view of the fact that the defendant had deposited the amount though under protest and that it is not open to him to go behind the order on that application. But then the Malabar Tenancy Act provides for an appeal against an order passed under section 25. Under section 25 of that Act if the amount fixed by the Court is deposited in an application for the grant of a renewal of a lease, the Court is entitled to pass an order directing the execution of a renewal deed; but then if the order directs the execution of a renewal deed by reason of the fact that a particular amount directed by the Court had been deposited and if he is aggrieved by that order in pursuance of which he had to deposit that amount, he will be entitled to file an appeal and that appeal will be an appeal against an order passed under section 25. Consequently, it has to be held that the appeal by the tenant is maintainable.

The only other questions for consideration are (1) whether the tenant is bound to pay interest from 1st December, 1930, on the renewal fee payable by him, and (2) whether the renewal is to take effect from 1st December, 1930, or from the date of the document.

In a later decision of this Court reported in *Bhavadasan Nambudiripad* v. *Narayanan Nair*[1], it has been held that the renewal takes effect from the date of the document and not from 1st December, 1930, and as a sequel to this it was held by this Court in S. A. No. 1034 of 1942 on 1st April, 1943, later in date to the above mentioned decision that interest is payable only from the date of the document and not from 1st December, 1930. In the light of both these decisions it has to be held that no interest is payable from 1st December, 1930, and as the amount has already been paid before the document was executed no interest has to be collected from the tenant. It has also to be found that the renewal deed to be executed will be a renewal of the lease for twelve years from the date on which the document is executed.

It is true that no objection as regards the period for which the renewal deed is to be executed was taken in the lower appellate Court. The objection is taken in second appeal and I permit it in view of the fact that it was only the decision of this Court which was subsequent to the filing of the appeal that necessitated the raising of this objection and also in view of the fact that the renewal deed has not been executed and is yet to be executed.

In the result, the District Munsif of Walluvanad will execute a renewal deed for twelve years from the date of the order directing the execution of the renewal deed. The amount already deposited by the tenant as interest on the renewal fee will be refunded to him. With regard to the suit the District Munsif will have to pass a decree in terms of the directions in the decree of the lower appellate Court which has not been iupset except in respect of the two points mentioned above. As regards the costs of these appeals, I direct each party to bear his own costs as it is in view of a later decision that the tenant had been permitted to raise an objection which otherwise he would not be entitled to raise.

K.S. ——— *Appeals by the tenant allowed.*

1. (1943) 1 M.L.J. 528.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING AND MR. JUSTICE SHAHABUDDIN.

Singaram Padayachi and others .. *Appellants.**

*Penal Code (XLV of 1860), section 300, thirdly—Scope—Injuries sufficient to cause death in the ordinary course of nature—Test—Injury if must cause death in all circumstances.*

It cannot be accepted that an injury sufficient in the ordinary course of nature to cause death is an injury, which inevitably and in all circumstances must cause death. If the probability of death is very great, the requirements of clause *thirdly* under section 300 of the Penal Code are satisfied, and the fact that a particular individual may, by the fortunate accident of his having secured specially skilled treatment, or being in possession of a particularly strong constitution, have survived an injury which would prove fatal to the majority of persons subjected to it, is not enough to prove that such an injury is not sufficient " in the ordinary course of nature " to cause death.

Appeal against the order of the Court of Session of the East Tanjore Division at Negapatam in C. C. No. 17 of 1943 dated 12th July, 1943.

*K. S. Jayarama Aiyar* for *V. V. Radhakrishnan* for Appellants.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Judgment of the Court was delivered by

*King, J.*—The three accused in this case have been convicted for the murder of one Rathnasami on the evening of the 21st December last.

The prosecution case is that they all attacked him, the first accused cutting him with an *aruval* on various parts of the body, and the other two accused attacking him with sticks, in the course of a concerted assault. They are, therefore, all guilty of murder under the provisions of section 302 read with section 34, Indian Penal Code. The deceased did not die until the 12th January, 1943. The cause of his death was septicaemia and that septicæmia was the direct result of some at least of the injuries. There can be no doubt, therefore, that death was brought about by the injuries which the deceased received.

The first question which arises is whether the appellants were actually guilty of causing any injuries. On this point, the learned Sessions Judge has rejected the evidence of the eye-witnesses, P. Ws. 1, 3 and 7 even though he is satisfied that P. W. 1 must have been present at the spot, because he himself was attacked and received injuries, on the ground that there are important discrepancies between their depositions. The Judge has, however, accepted the statements made by the injured man himself shortly after the injuries were caused. There are three such statements. One was made as the first information in the case to the village munsif at a very early hour after the injury had been caused (Ex. F), another was made to a neighbouring village munsif (Ex. H-1) on the same night and the third was made to the Civil Assistant Surgeon in the Local Fund Hospital at Shiyali about 6 o'clock the next morning. In all these statements the deceased has explained the reasons for the attack upon him, which were that he suspected the first accused of stealing some of his property and had questioned him about it; and they state specifically that the first accused had caused him injuries with an *aruval* and the second and third accused had attacked him with sticks. There seems to be no reason at all why these dying declarations should be discredited. No suggestion has been made at any stage of the case to explain why the deceased, who was undoubtedly severely injured and in all probability must have known who his assailants were, should have substituted the names of the accused for those of the real offenders; and in the arguments before us, the learned counsel, who has appeared for the appellants, has not seriously contested the strength and significance of these dying declarations. There can, therefore, we think, be no doubt that it was the appellants who were responsible for the injuries caused.

The next question is whether they are, on that account, guilty of murder. In the case of the first accused we have little doubt that he has been rightly found guilty of murder. It is he who has caused the majority of the ten injuries which were catalogued in Ex. B. on the morning after the assault. All but two of these are likely to have been caused, according to the medical evidence, by an *aruval*.

* Cr. App. No. 506 of 1943. 12th November, 1943.

One of them, the third injury in Ex. B, is an injury of very great severity, being a cut five inches long, three and a half inches broad and three inches deep with fracture of all the bones on the shoulder. In the opinion of P. W. 5, the doctor who attended the deceased, this injury alone was sufficient in the ordinary course of nature to cause death, and when taken in conjunction with the other injuries caused, death was all the more certain. P. W. 6, the doctor who gave the *post-mortem* certificate, was asked by the Court whether injury No. 3 was sufficient in the ordinary course of nature to cause death. His answer was "compound fracture may or may not cause death. It depends upon the vitality, the efficient treatment and complication such as sepsis." The learned Sessions Judge in paragraph 10 of his judgment accepts the evidence of P. W. 5 and says that it has not been rebutted by this answer given by P. W. 6. We agree with that appreciation of the evidence. P. W. 6's answer is far too general to be regarded as contradicting what P. W. 5 has said. We are not prepared to assent to any argument that an injury sufficient in the ordinary course of nature to cause death is an injury, which inevitably and in all circumstances must cause death. If the probability of death is very great, then it seems to us the requirements of *thirdly*, under section 300 are satisfied, and the fact that a particular individual may by the fortunate accident of his having secured specially skilled treatment, or being in possession of a particularly strong constitution have survived an injury which would prove fatal to the majority of persons subjected to it, is not enough to prove that such an injury is not sufficient "in the ordinary course of nature" to cause death. Particularly in view of the fact that injury No. 3 was not the only injury caused by the first accused, we are of opinion that the cumulative effect of all the injuries, which he alone caused to the deceased, was such that "in the ordinary course of nature" the deceased was almost bound to die. In these circumstances the conviction of the first appellant for murder is amply justified and his conviction and sentence must be confirmed.

In the case of the second and third appellants, we are not satisfied that any common intention to murder the deceased has been made out on the evidence. This part of the case does not appear to have been discussed by the learned Sessions Judge, except in so far as to hold that they were all interested in causing some kind of injury to the deceased. In paragraph 21 of his judgment, he says that all the appellants "made common cause to punish the deceased and P. Ws. 1 and 2." There is nothing in the case to suggest that any of the three appellants had deliberately formed the intention of causing the death of the deceased. The cause of the original quarrel between them was not such as would normally be likely to lead to so calamitous a result. The actual injuries, which alone can have been caused by the second and third appellants were only two in number—two contusions on the head which are injuries Nos. 1 and 2 in Ex. B. These contusions did not involve the fracture of any of the bones of the skull and although they are not small, there is nothing to show that they were caused by a blow aimed with a weapon which can be called deadly or with any unduly violent force. No doubt, the second and third appellants were aware of the fact that the first appellant was attacking the deceased with an *aruval*, but there is nothing to show that they had taken any part in providing him with that weapon. We are of opinion, on the contrary, that unless the evidence of P. W. 3 is accepted, there is no sufficient material for holding it proved beyond reasonable doubt that the second and third accused shared in the intention of the first accused to cause such injuries with the *aruval* as would result in death. P. W. 3 states that while the first accused cut the deceased, the second and third accused were holding him. If that evidence is true, it appears likely that they held him deliberately in order to facilitate the attack by the first accused, but as already stated, the learned Judge was not prepared to accept the direct evidence; and when he finally finds all the three accused guilty under the provisions of section 34, he makes no specific reference to it. We accordingly find that the only offence of which the second and third accused can be convicted is one under section 323, Indian Penal Code and in view of the fact that they have already served four months of the sentence of transportation imposed upon them and must have been in custody several months before that, we reduce the sentence to

the period of imprisonment already undergone and direct that the second and third appellants be immediately released.

K.S. ——— *Convictions of second and third appellants varied.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

R. M. Periathambi Goundar .. *Appellant**

*v.*

Palanivelappa Goundar .. *Respondent.*

*Madras Agriculturists' Relief Act (IV of 1938)—Rules under, rule 8—Application for scaling down—Appeal by creditor—Suit filed by creditor pending appeal—Order of dismissal of appeal—Validity.*

When rule 8 of the rules framed under Madras Act IV of 1938 speaks of an application pending in the Court it covers not merely an application pending in the Court of first instance but also an application pending in appeal before the appellate Court. The Court hearing an appeal from an order on an application under the Act can dismiss the same when the fact of a suit having been filed by the creditor is brought to its notice.

Appeal against the order of the District Court of Coimbatore dated 9th February, 1943 and made in A. S. No. 347 of 1942, preferred against the order of the Court of the Subordinate Judge of Coimbatore dated 9th March, 1942 and made in O. P. No. 123 of 1941.

*S. Thyagaraja Aiyar* for Appellant.

*N. Somasundaram* and *A. C. Muthanna* for Respondent.

The Judgment of the Court was delivered by

*Wadsworth, J.*—The appellant (a creditor) filed a petition under the rules framed under Madras Act IV of 1938 for the determination of the amount of the debt due to him and an order was passed in his favour on the 9th March, 1942. Against this order an appeal was filed by the debtor on the 22nd June, 1942. By this time, the debt was in danger of becoming time barred. The creditor consequently filed a suit on the 2nd July, 1942, in order to save limitation. The fact of the suit having been filed was brought to the notice of the Court hearing the appeal from the declaration and that Court dismissed the appeal under rule 8. Rule 8 provides that if at any time while an application is pending in the Court a suit is filed by the creditor for the recovery of the debt which is the subject-matter of the application the Court shall dismiss the application. It is contended in appeal that this rule refers only to the Court of first instance and to the application pending before that Court and that it will not cover the Court of Appeal and the application pending in appeal before the appellate Court. In these rules the term "Court" is defined as "the Court having jurisdiction under these rules." We find no difficulty in holding that the term will include the appellate Court having jurisdiction under the rules and not merely the Court of first instance. It seems to us also that when rule 8 speaks of an application pending in the Court, this phrase must cover not merely an application pending in the Court of first instance but also an application pending in appeal before the appellate Court. Seeing that the rule provides that when a suit is filed the proceedings in the application shall stop, there is no logical reason for applying this procedure only when the application is pending in the trial Court and not when the application is pending in appeal.

There is one matter only in which the order of the lower appellate Court requires modification. That order provides that the costs in the lower appellate Court shall be costs in the suit between the parties. It is pointed out that the costs in both the Courts which dealt with the application should properly be costs in the suit. Subject to this modification, the appeal is dismissed. The costs in the appeal will be costs in the suit.

B.V.V. ——— *Order modified.*

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* A. A. A. O. No. 60 of 1943. 20th September, 1943.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE HAPPELL.

Vedachala Chettiar .. *Appellant**

*v.*

Ameena Bi Ammal and others .. *Respondents.*

*Evidence Act (I of 1872), section 68, Proviso—Registered document—Allegation that document represents a sham transaction—Does not amount to denial of execution so as to make the calling of attesting witnesses ssential for its proof.*

Where a registered mortgage deed is attacked on the ground that it represents a sham and nominal transaction entered into to defeat a creditor, there is no specific denial of execution so as to make it necessary to call the attesting witnesses to prove the execution of the document. A document may represent a sham transaction, notwithstanding that it has been executed by the person who is mentioned in the document as being the executant.

Appeal against the decrees of the District Court of Chingleput dated 25th November, 1941, in A. S. Nos. 171 and 123 of 1940 preferred against the decree of the Court of the District Munsiff of Chingleput dated 10th May, 1940, in O. S. No. 106 of 1939.

*K. S. Champakesa Aiyangar* for Appellant.

*T. C. A. Bashyam, T. C. A. Thirumalachari, C. Srinivasachari, T. R. Sundaram, K. Thiruvenkatachari*, and *P. S. Ramaswami Ayyangar* for Respondents.

The Judgment of the Court was delivered by

*The Chief Justice.*—In the first instance this appeal came before Patanjali Sastri, J., who was of the opinion that it involved the consideration of the judgments of this Court in *Thayammal* v. *Muthukumaraswami Chettiar*[1] and *Dawood Rowther* v. *Ramanathan Chettiar*[2] which were regarded as being in conflict. In our opinion it is not necessary to embark upon a discussion of these cases in order to decide this appeal.

On the 5th March, 1927, the first and second defendants executed a mortgage of the property in suit in favour of two persons, Raju Chetti and Dhanapala Chetti, to secure the payment of a sum of Rs. 250. The first defendant is the son of the second defendant. The plaintiff avers that on the 14th October, 1929, the mortgagees assigned the mortgage to him. On the 6th March, 1939, the plaintiff instituted a suit to enforce the mortgage and the appeal arises out of the decree passed in that suit.

On the 27th January, 1932, the fourth defendant purchased at a Court sale, the right, title and interest of the first defendant in the property. All the defendants filed written statements, but the main contest was with the second and fourth defendants. The first defendant admitted the execution of the mortgage, but pleaded that it had been discharged by reason of the provisions of the Madras Agriculturists' Relief Act. His mother, the second defendant, specifically denied the execution of the deed of mortgage. She admitted that she had placed her thumb impression on a document, but she alleged that she had been told that it was a deed partitioning the property between her and the first defendant. She further averred that the document had not been properly attested. The fourth defendant pleaded that the mortgage had been entered into in order to delay and, if possible, defeat him. He also alleged that the assignment to the plaintiff was without consideration and "sham and nominal." The District Munsiff of Chingleput, in whose Court the suit was filed, held that the mortgage deed and the deed of

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* S. A. No. 444 of 1942. 27th July, 1943.

1. (1929) 57 M.L.J. 588 : I.L.R. 53 Mad. 119. 2. I.L.R. (1938) Mad. 523.

assignment were genuine documents and had been validly executed. Accordingly he passed a preliminary decree for sale as against the first, second and fourth defendants.

The District Munsiff's decision was reversed by the District Judge of Chingleput. The District Judge held that the mortgage was a sham transaction, entered into between the first defendant and the mortgagees with the object of defeating the fourth defendant. This finding of fact would be binding on us, if the District Judge had taken into consideration all the material evidence, but obviously this he has not done. He has dealt with the question of the validity of the mortgage in a very perfunctory manner and has ignored evidence which, in our opinion, clearly shows the genuineness of the mortgage. The District Judge found the mortgage to be a sham transaction because at the time it was entered into the fourth defendant was endeavouring to attach before judgment the same property and the plaintiff had refrained from taking steps to enforce the mortgage for a period of ten years, notwithstanding that the second defendant had denied the validity of the transaction when he gave her notice of the assignment. The effort on the part of the fourth defendant to secure an order of attachment before judgment and the delay in the institution of the suit are, of course, factors to be taken into consideration, but they are not necessarily the deciding factors.

The evidence which the District Judge failed to consider is this : Raju Chetti and Dhanapala Chetti obtained a money decree against the first defendant in S. C. S. No. 933 of 1925 and in execution of that decree they attached and brought to sale the property now in suit. In order to prevent the sale being confirmed, the first defendant paid a sum of Rs. 180 to the mortgagees, which left Rs. 250 owing to them. As security for the balance of Rs. 250 the mortgage in suit was executed, and when this had been done the sale was set aside.

The mortgage deed has been exhibited in this case and Dhanapala Chetti has proved the circumstances under which it was executed. When this evidence is taken into consideration it cannot reasonably be said that the transaction was a mere sham. It does appear that the second defendant now claims the property to be hers, but the question whether she shares it with the first defendant has not been decided. As we shall presently show the mortgage deed cannot be enforced against the second defendant, but this is obviously no ground for regarding the mortgage as being a bogus transaction.

The plaintiff did not call either of the attesting witnesses, and the Court has at this stage to decide what is the effect of this neglect? As the first defendant admitted execution, the mortgage deed is clearly enforceable against him, that is, enforceable to the extent of his right, title and interest in the mortgage property ; but the second defendant specifically denied the execution of the mortgage deed and the failure on the part of the plaintiff to call the two attesting witnesses or one of them is fatal to his case against her. Section 68 of the Evidence Act states that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. Then follows a proviso which states that it shall not be necessary to call an attesting witness in proof of the execution of a document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied. As the second defendant specifically denied execution this section clearly made it incumbent on the plaintiff to call one of the attesting witnesses to prove the mortgage.

We have now to consider whether the mortgage is enforceable against the fourth defendant. His learned advocate has contended that the averments in his written statement also amount to a specific denial of execution and that he is in the same position as the second defendant. We are unable to accept this contention. In his written statement, the fourth defendant attacked the mortgage deed on the

ground that it represents a sham and nominal transaction, entered into by the first and second defendants in order to defeat him. This is not a specific denial of execution. A document may represent a sham transaction, notwithstanding that it has been executed by the person who is mentioned in the document as being the executant. In order to call in aid section 68, the fourth defendant had to deny execution, which he did not.

The fourth defendant did not acquire any interest of the second defendant in the property. He merely bought the right, title and interest of the first defendant. As the first defendant had before this purchase mortgaged his right, title and interest in the property, whatever it might be, and the mortgage had been assigned to the plaintiff, the fourth defendant stands behind the plaintiff. The fourth defendant has, of course, the right to redeem the mortgage. If he does not redeem and the property is sold, he will be entitled to be paid out of any surplus there may be after the discharge of the amount due to the plaintiff.

When the plaintiff's evidence was about to be concluded the fourth defendant sought the leave of the Court to the amendment of the first issue which as originally framed read as follows :

"Whether the suit mortgage is true, valid and supported by consideration or was it a sham document calculated to defraud the rights of the fourth defendant?"

The application was for the insertion of the words "and subsisting" between the word "consideration" and the word "or". Apparently the object of the fourth defendant was to lead evidence to prove that the land in suit had been sold by a revenue Court and that he had acquired a *patta* from the landholder. The fourth defendant succeeded in inducing the District Munsif to make the amendment, but when he came to deliver his judgment the District Munsif obviously repented of so doing, because he refused to consider this question. His reasons were that the point had not been taken in the written statement and the opposite party had not been given an opportunity of meeting the new case which the fourth defendant wished to set up. It is regrettable that the amendment of the issue should have been allowed. The fourth defendant says that he obtained the patta in 1937, but he made no mention of it when he filed his written statement on the 9th January, 1940. It was far too late at the close of the plaintiff's case to allow the fourth defendant to set up a new case. The application has been renewed in this Court, but we see no reason to differ from the District Munsif. It would mean the remanding of the case for the taking of further evidence and the plea was raised too late in the trial Court.

The result is that the appeal will be allowed and there will be a preliminary mortgage decree passed against the first and fourth defendants. Three months time will be allowed for redemption. The suit will be dismissed as against the second defendant. The appellant is entitled to his costs as against the first and fourth defendants, but he will pay the costs of the second defendant.

K.S. — *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Jadam Jampur Bai *alias* Venkamma .. *Appellant**

*v.*

Jinki Siddappa since deceased and another .. *Respondents.*

*Transfer of Property Act (IV of 1882), sections 41 and 58 (c)—Deed described as 'conditional sale'—Whether mortgage or outright sale—Alienations by transferee—Suit for redemption—Plea of estoppel—Failure of plaintiff to set up his claim in suit for rent—Whether* res judicata *in redemption suit.*

A deed of transfer was headed 'conditional sale' and contained the following recitals : "If we do not pay the amount by the due date (*viz.*, within five years) we agree to this document being

*S. A. No. 1202 of 1942. 14th October, 1943.

treated as a sale deed. After the due date you and your heirs will have absolute powers in respect of the property. We and our heirs will not have any rights."

*Held*, (*i*) that the deed was a mortgage only, the later recital amounting to a clog on the equity of redemption.

(*ii*) If the alienees from the transferee, of portions of the property covered by the hypotheca had perused the document in question they must bear the consequences, the principle of *caveat emptor* applying.

*Obiter dictum* of Srinivasa Ayyangar, J., in *Sethu Madhava Ayyar* v. *Bacha Bibi*, A.I.R. 1928 Mad. 778, distinguished.

(*iii*) Under section 41 of the Transfer of Property Act the alienee must show in the first instance that the owner has held out some other person as the ostensible owner of the property. It is only then that he has to show that the alienee had some notice of his true title.

*Rajah of Karvetnagar* v. *Echampadi Saravana Pillai*, (1916) 35 I.C. 893 and *Ramcoomar Koondoo* v. *McQueen*, (1872) 11 B.L.R. 46 (P.C.), referred to.

(*iv*) The estoppel in such cases is between the true owner and the alienee in good faith, not between the parties to the mortgage.

(*v*) Where an earlier suit between the parties was decreed *ex parte* and it appeared that the material issues therein would have been decided in the same way whether the deed was construed as a sale or as a mortgage,the decision in that suit could not operate as *res judicata* on the question in the later suit, as to whether the deed was a mortgage or sale.

Appeal against the decree of the District Court of Bellary in A. S. No. 19 of 1940, preferred against the decree of the Court of the District Munsiff of Hospet in O. S. No. 629 of 1939.

*Ch. Raghava Rao* for Appellant.

*Kasturi Seshagiri Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The suit out of which this appeal arises was one for redemption. Both the Courts below have held that the plaintiff was entitled to redeem. The first defendant opposed the suit on many grounds ; but those with which we are concerned are : (1) that the transaction entered into between the plaintiff and the first defendant was not a mortgage but a sale ; (2) that in any event the matter is governed so far as a large portion of the hypotheca was concerned by section 41 of the Transfer of Property Act and otherwise by estoppel, the plaintiff having held out the first defendant as the ostensible owner of the property and allowed various portions of the property to be alienated; and (3) that the plaintiff is precluded from setting up his claim because he failed to put it forward in O. S. No. 604.

I need not repeat the arguments of the learned District Munsif and the learned District Judge in their judgments. Ex. A, the document in question, has been set out in full. The document is headed "conditional sale" and not "sale" from which one would understand a document which was to operate as a sale only upon a certain contingency. We find that the body of the document confirms this interpretation. The plaintiff said in that document,

> "If we do not pay your amount by the due date (*viz.*, within five years) we agree to this document being treated as a sale deed."

It appears from this that the conveyance was not a sale at all, but was to operate as a sale only after a period of five years and then only if the plaintiff had not paid the amount advanced under the document. The recital,

> "After the due date you and your heirs will have absolute powers in respect of the property. We and our heirs will not have any rights"

would merely amount to a clog on the equity of redemption.

There are at least three reasons why the appellant cannot succeed on his plea of estoppel. The nature of the estoppel except with regard to the one alienation as to which there is no dispute in this Court—is that the alienees of various items of the hypotheca perused Ex. A and formed a *bona fide* belief that under it the first defendant acquired an absolute title to land. In the first place, the alienees with

whom we are concerned did not enter the witness box, and so we do not know that they looked into Ex. A. In the second place, if they did so and misunderstood it, they must bear the consequences, the principle of *caveat emptor* applying. The learned advocate for the appellant relied on an observation of Srinivasa Ayyangar, J., in *Sethu Madhava Ayyar* v. *Bacha Bibi*[1]. The case with which the learned Judge was dealing there was one in which there were two documents which had to be read together. One was an absolute conveyance by sale and the other was a contract to reconvey after a certain date if a certain price were paid. Certain purchasers of parts of the hypotheca in this mortgage by conditional sale saw the document whereby the land was purported to be conveyed absolutely but had no reason to suspect that there was another document in existence which, when read with the one they had seen, would show that the transaction was not an absolute sale but a mortgage by conditional sale. Srinivasa Ayyangar, J., went further than was necessary, however, and seemed to be of opinion that even if they had seen the other document and read the two together, they were entitled to be protected by the provisions of section 41, because it was possible for a layman reading those two documents to believe that there was an absolute conveyance. With respect, I find it difficult to agree with this *obiter dictum*. It is however unnecessary to expressly dissent from this dictum in view of the fact that there are two other reasons why section 41 of the Transfer of Property Act will not apply. In this connection, it was argued that the burden lay upon the plaintiff under section 41 of the Transfer of Property Act of showing that the transferees were not misled by Ex. A; but I do not find any reason to think that section 41 throws such a burden on the true owner of the property. Reliance has been placed upon *Rajah of Karvetnagar* v. *Echampadi Saravana Pillai*[2], where a passage from *Ramcoomar Koondoo* v. *McQueen*[3] is quoted. The relevant passage is:

> " It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value from the apparent owner in the belief that he is the real owner the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of the real title or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it."

That passage itself indicates that the alienee must show in the first instance that the owner has held out some other person as the ostensible owner of the property. It is only then that he has to show that the alienee had some notice of his true title. Finally, on this point of estoppel, the estoppel is between the true owner and the alienee in good faith, not between the parties to the mortgage. The first defendant cannot invoke section 41 of the Transfer of Property Act; because when he made those alienations he knew or should have known that he had no right to make them.

O. S. No. 604 of 1941 was a suit for rent brought on Ex. A and that suit was unopposed and was decreed *ex parte*. On the allegations in the plaint the only points that could have been in issue in the suit were whether the first defendant was entitled to rent and whether, if the rent were not paid, he was entitled to possession. There can be no doubt that under Ex. A—whether it may be construed as a deed of sale or as a usufructuary mortgage—the first defendant was entitled to rent and that if rent was paid he was not entitled to possession. So the decision in that suit could not have operated as *res judicata* on the question whether Ex. A was an outright sale or a usufructuary mortgage.

This second appeal fails and is dismissed with costs.

V.P.S. ——— *Appeal dismissed.*

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1. A.I.R. 1928 Mad. 778.
2. (1916) 35 I.C. 893.
3. (1872) 11 B.L.R. 46 (P.C.).

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

Rajula Pullayya .. *Appellant**

*v.*

Sri Raja Kesara Chenna Krishnarao Bahadur, Zamindar Garu of Ratnavaram and another .. *Respondents.*

Res judicata—*Decision of District Collector in revision under section 205, Madras Estates Land Act, in proceeding relating to a suit in which an appeal lay—Cannot operate as* res judicata *in appeal before District Judge against decision in the suit.*

In a suit for rent the plaintiff applied for leave to amend the schedule to the plaint on the ground of a clerical mistake. The Sub-Collector refused to grant leave and a revision petition under section 205, Madras Estates Land Act, to the District Collector was also dismissed. Subsequently the suit also was dismissed on the ground that no decree could be given on so defective a plaint. The District Judge, however, on appeal allowed the amendment and remanded the suit to the Sub-Collector for disposal according to law. In appeal against the order of remand it was contended that the District Judge had no jurisdiction to allow the amendment as the decision of the District Collector in the revision petition operated as *res judicata* in the present proceedings.

*Held*, that the District Collector's jurisdiction was severely limited, not only by the fact that it was conferred upon him by the particular Act, namely, the Madras Estates Land Act and therefore dealt with a very restricted subject-matter but also by reason of the terms of section 205 of the Act itself. It cannot be said that in the general sense of the word a District Collector has jurisdiction to decide civil disputes. It is clear that an appeal does lie from the decision in the present suit. Therefore the District Collector had no jurisdiction to pass the order in revision which he passed in so far as it decided on the merits that no amendment should be allowed. Such a decision could not operate as *res judicata* in the appeal against the dismissal of the suit.

Appeal against the order of the District Court of Kistna at Chilakalapudi, dated 31st March, 1942 and made in Appeal No. 226 of 1941, preferred against the decree of the Court of the Sub-Collector of Bezwada division dated 28th August, 1941 and passed in S. S. No. 93 of 1939.

*P. Satyanarayana Rao* for appellant.

*K. Kameswara Rao* for respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit brought by the Zamindar of Ratnavaram in the Court of the Sub-Collector of Bezwada. It was a suit for rent filed against two defendants, and so far as the descriptive matter in the plaint itself is concerned it was filed against them on the ground that they owned it as pattadars of patta No. 20 of the village of Ratnavaram. Attached to the plaint was a schedule in which a description of this land was given. Before the suit was tried the plaintiff had realised that the particulars of the description were inaccurate, and in fact he alleged that by a clerical error they had been copied from a patta, also No. 20, relating to the village not of Ratnavaram but of Thallabella. Plaintiff accordingly applied to the Sub-Collector for leave to amend the schedule. The Sub-Collector refused to grant leave. Plaintiff then applied under section 205 of the Madras Estates Land Act to have this order revised by the District Collector of Kistna. In February, 1940, the Collector dismissed this application. The suit proceeded to trial and eventually it was dismissed by the Sub-Collector on the main ground that it was impossible to grant a decree on so defective a plaint. Plaintiff then appealed to the learned District Judge of Kistna. The learned Judge held that the errors in the schedule were obviously due to a clerical mistake and that from the recitals in the plaint, the plaintiff clearly intended to file his suit in respect of patta No. 20 of Ratnavaram. He held that in these circumstances the amendment ought to have been allowed and he repelled the argument addressed against the amendment on the score of limitation. On these matters there has been no dispute in the appeal before me. A further contention was however raised on behalf of the second defendant before the learned District Judge to the effect that as the Collector

* A. A. O. No. 432 of 1942. 27th September, 1943.

had already on revision refused to allow the amendment, the District Judge had no jurisdiction to allow it. The judge refused to accept this contention, allowed the amendment and remanded the suit to the Sub-Collector for disposal according to law. This is an appeal by the second defendant against that order of remand.

The only serious point taken in the appeal is that the learned District Judge had no jurisdiction to allow the amendment. The argument is that this matter has already been decided by the District Collector and his decision is *res judicata* in the present proceedings. In support of this argument reliance is placed upon a judgment of a Bench of this Court reported in *Chinnappa Reddi* v. *Official Receiver, Guntur*,[1] to which I was myself a party. That was a case dealing with the decision of an executing Court that it had jurisdiction to decide matters arising in that particular execution. This decision was given in spite of a contention that by reason of section 37 of the Provincial Insolvency Act, the executing Court had no jurisdiction. It was held by us that the executing Court had inherent jurisdiction to deal with any matter in execution provided the petition lay otherwise within its jurisdiction and it had jurisdiction therefore to decide whether it had jurisdiction or not. Although that decision was eventually proved to be wrong the decision was nevertheless *res judicata*. In that ruling we drew a clear distinction between the decisions of Courts which had an inherent jurisdiction to come to those decisions, and cases in which Courts had no jurisdiction at all. In the former case the decisions were merely voidable, in the latter they were void and could not be relied upon as constituting *res judicata*.

It seems to me clear that the present case is not one in which there is any question of inherent jurisdiction lying in the Court of the District Collector. The District Collector's jurisdiction is severely limited, not only by the fact that it is conferred upon him by a particular Act like the Estates Land Act and therefore deals with a very restricted subject-matter, but also by reason of the terms of section 205 itself. It cannot be seriously argued that in the general sense of the word a District Collector has jurisdiction to decide civil disputes. The terms of section 205 are as follows :—

> "The Board of Revenue or the District Collector may call for the record of any proceedings before a Collector from whose decision no appeal lies, if such officer appears to have exercised a jurisdiction not vested in him by law, or to have failed to exercise a jurisdiction so vested, or while acting in the exercise of his jurisdiction to have contravened some express provision of law affecting the decision on the merits, where such contravention has produced a serious miscarriage of justice ; and the Board of Revenue or the District Collector, as the case may be, may, after hearing the parties if they attend, pass such order as seems fit."

The main question therefore to be decided is whether the issue of the allowing or refusing to allow the amendment in the present plaint was a proceeding before a Collector from whose decision no appeal lies. If it were not, clearly the District Collector had no jurisdiction to entertain any application in revision. It has been clearly pointed out in *Paramaswami Iyengar* v. *Alamelu Nachiar Ammal*[2] that "proceeding" in section 205 relates only to a proceeding in a suit from which no appeal lies. Clearly an appeal does lie from the decision in the present suit. The authority of *Paramaswami Iyengar* v. *Alamelu Nachiar Ammal*[2] has been reaffirmed by another Bench of this Court in *Mahant Prayag Dassji* v. *Chinna Rama Naidu*[3]. There can therefore be no doubt that the District Collector had no jurisdiction to pass the order in revision which he passed in so far as it decides on the merits that no amendment should be allowed. The result is that the decision of the learned District Judge cannot be attacked on the ground of *res judicata*. As already indicated it has not been seriously challenged on any other ground. This appeal accordingly fails and is dismissed with costs.

V.S. ——— *Appeal dismissed.*

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1. (1935) 69 M.L.J. 196 : I.L.R. 59 Mad. 62.
2. (1918) 35 M.L.J. 632 : I.L.R. 42 Mad. 76.
3. (1933) 68 M.L.J. 324.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Atmaram Rao's charity estate represented by its trustee, Vasudeva, Rao. .. *Appellant**

*v.*

Packiri Mohammed Rowther .. *Respondent.*

*Trust—Alienation of trust property—*De facto *trustee—Suit for recovery of trust property—Maintainability.*

A person who is not the *de jure* trustee but is only a *de facto* trustee is not competent to sue for recovery of possession of trust property alleged to be wrongfully alienated.

*Vedakkannu Nadar* v. *Ranganatha Mudaliar*, (1938) 2 M.L.J. 663, relied on.

*Mahanth Ramcharan Das* v. *Naurangi Lal*, (1933) 64 M.L.J. 505 : L.R. 60 I.A. 124: I.L.R. 12 Pat. 251 (P.C.) and *Mahadeo Prasad Singh* v. *Karia Bharati*, (1934) 68 M.L.J. 499 : L. R. 62 I.A. 47 : I. L. R. 57 All. 159 (P.C.), considered

Appeal against the decree of the Court of the Subordinate Judge of Mayavaram, in A. S. No. 82 of 1941, preferred against the decree of the Court of the District Munsiff of Mayavaram in O. S. No. 171 of 1940.

*R. Sundaralingam* for appellant.

*A. V. Viswanatha Sastri* and *S. R. Chandran* for respondent.

The Court delivered the following

JUDGMENT.—The appellant sued as trustee for recovery of trust property alienated to the respondent. The first Court dismissed the suit, holding that the appellant had failed to prove that he was a *de jure* trustee and that he could not succeed merely as a *de facto* trustee. The lower appellate Court substantially agreed with the District Munsiff; but held that if the appellant was a *de facto* trustee, he could be given a declaratory decree that the alienation was not binding on the institution. The lower appellate Court, however, refused a decree for possession. Hence this appeal.

The learned Subordinate Judge in holding that the appellant was not entitled to possession as a *de facto* trustee, purported to follow *Vedakannu Nadar* v. *Ranganatha Mudaliar,*[1] a decision in which a Bench of this Court held that a *de facto* trustee was a trustee *de son tort* and was in no better position than a trespasser. Mr. Sundaralingam argues that this decision is wrong, because the Privy Council has twice held that a person who holds an office can sue, even though he may not have legal title to the office. The earlier case was *Mahanth Ramcharan Das* v. *Naurangilal*[2]. There upon the death of a mahant, the plaintiff succeeded him and held office. It was objected that he had not been legally appointed a mahant ; and their Lordships said,

"Their Lordships, however, are not concerned with any question of title, because both the Courts below had found that the plaintiff was the person in actual possession of the Paliganj Math and as such entitled to maintain a suit to recover property not for his own benefit but for the benefit of the math."

In the latter case *Mahadeo Prasad Singh* v. *Karia Bharati*[3], two rival claimants, *R* and *K* to the office of mahant, entered into a compromise whereby *R* was to become installed as mahant and *K* was to be nominated as his successor. *K* was however a minor ; and when he attained majority he repudiated this agreement. Another compromise took place in which *R* agreed to put *K* into possession of the math and in pursuance of this agreement *K* thereafter managed the affairs of the math. It was objected, however, when he sought to recover some property wrongfully alienated by *R*, that *R* had not actually relinquished the office of mahant. All that their Lordships said on the question of the rights of *K* to maintain a suit was "As observed by the Board in *Mahanth Ramcharandas v. Naurangilal*[2] a person in actual possession of the math is entitled to maintain a suit to recover property appertaining to it, not for his own benefit, but for the benefit of the math." There is no discussion of the principles involved ; and I do not think that their Lordships can be understood in these two cases as laying down the principle that any person who obtains possession of an office—still less of the property of a trust—is entitled to maintain a suit for

* S. A. No. 1367 of 1942. 5th November, 1943.

1. (1938) 2 M.L.J. 663.
2. (1933) 64 M.L.J. 505 : L.R. 60 I.A. 124 : I.L.R. 12 Pat. 251 (P.C.).
3. (1934) 68 M.L.J. 499 : L.R. 62 I.A. 47 : I.L.R, 57 All. 159 (P.C.).

possession of property alienated. I am bound by the decision in *Vedakkannu Nadar* v. *Ranganatha Mudaliar*[1], which lays down a principle of general application. The plaintiff here claims to have acquired the office by virtue of a will and a transfer; and it would seem to be wrong that he should be permitted to maintain a suit without proving that he had acquired a right to the office of trustee which would entitle him to represent the institution. In the Privy Council cases above referred to, there was no question about who should hold the office or as to who was the person entitled to bring the suit. The persons who filed the suits could alone have represented the institution and brought the suits. There was nobody else to do so. The lower appellate Court was therefore right. The appeal is dismissed with costs.

B.V.V. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Adhilakshmi Ammal .. *Appellant**

*v.*

Srinivasa Goundan *alias* Krishna Goundan .. *Respondent.*

*Civil Procedure Code (V of 1908), Order 21, rules 22 and 106—Notice to judgment-debtor settling terms of proclamation—Omission to declare sufficiency of service—Effect—Failure to raise objections to executability of decree—Order—If operates as* res judicata *even where petition is dismissed shortly after date fixed for appearance of judgment-debtor.*

Although an execution petition was dismissed shortly after the date fixed for the appearance of the defendant that would not mean that an earlier order " Proclaim and sell " was not an order that was binding on him, with its implication of executability. The order is final and conclusive against the defendant who had failed to raise a defence to the executability of the decree (in the present case on the ground of its being barred by limitation) despite the fact that the execution petition was subsequently dismissed. In a subsequent execution petition the decision would operate as constructive *res judicata* on the question of the executability of the decree.

*Lakshmanan Chetti* v. *Palaniappa Chetti*, A.I.R. 1928 Mad. 1052 and *Venkata Ranga Reddi* v. *Chinna Seethamma*, (1941) 1 M.L.J. 271, applied.

One has to consider the facts of each case and decide on those facts whether the failure to declare a judgment-debtor *ex parte* was a mere omission and the subsequent procedure made it clear that the judge did consider the service of notice sufficient, or whether the facts of the case left in some doubt the question whether there was a proper service or not. Where a defendant refused service on the frivolous ground that his father's name was not correct, despite the fact that his father was served at the same time and was a party to the same proceedings the executing Court could have considered the service sufficient. From the fact that the executing Court immediately ordered " Proclaim and sell " it can be inferred that the executing Court considered the service sufficient.

Appeal against the appellate order of the District Court of South Arcot, dated 28th April, 1942 and made in A. S. No. 36 of 1941, preferred against the order of the Court of the District Munsiff of Cuddalore dated 23rd December, 1940 and made in E. P. R. No. 728 of 1940 in O. S. No. 910 of 1930.

*C. S. Vidyasankaran* for Appellant.

*T. E. Ramabhadrachariar* for Respondent.

The Court delivered the following

JUDGMENT.—The execution petition out of which this second appeal arises was marked as E. P. No. 728 of 1940 and was filed on 25th June, 1940. The preceding execution petition on which a final order was passed was E. P. No. 270 of 1937, which was dismissed on 25th June, 1937. That application was admittedly out of time; but the question is whether the respondent, the second judgment-debtor, is entitled to raise that plea in this application in view of the fact that he did not raise it in E. P. No. 270 of 1937. The first Court held that in accordance with the principle of constructive *res judicata* he was precluded from raising that objection in the present execution proceeding. In appeal, the present respondent put forward two reasons why he was not estopped from raising this objection. One was that he was not properly served in that suit, and so had no opportunity of raising the objection; and, secondly, that as that petition was dismissed shortly after the date fixed for his appearance, there was no occasion for him to file any application either to set aside the *ex parte* decree or to appeal. The respondent also contended

1. (1938) 2 M.L.J. 663.

* A. A. A. O. No. 229 of 1942. 10th September, 1943.

that even if he had been served, no occasion arose on which he was bound to raise the question of the executability of the decree; because the only notice he received was one under Order 21, rule 66, Civil Procedure Code. He relied on a Full Bench decision of this Court in *V. C. T. N. Chidambaram Chettiar* v. *Theivani Ammal*[1], in support of his contention. The lower appellate Court, although of opinion that this decision did not apply to the facts of this case, held that as the executing Court had failed to declare that service was sufficient, he was not properly served and that therefore the principle of constructive *res judicata* could not be applied.

Although it is true that E. P. No. 270 of 1937 was dismissed shortly after the date fixed for the appearance of the defendant, that would not mean that the earlier order "Proclaim and sell" was not an order that was binding on him, with its implication of executability. If, for example, the second defendant had appeared and raised the question of executability, the Court would have had to consider whether the decree was executable or not; and if a decision adverse to the second defendant had been passed, there can be no doubt that that decision would have been final between the parties, even though shortly afterwards the petition had been dismissed; for the order would have been separately appealable. Similarly, such an order would have been final and conclusive against any person who had failed to raise a defence to the executability of the decree, despite the fact that the execution petition was subsequently dismissed, vide *Lakshmanan Chetty* v. *Palaniappa Chetti*[2] and *Venkata Ranga Reddi* v. *Chinna Seethamma*[3].

It is true that *Chidambaram Chettiar* v. *Theivani Ammal*[1] bears some resemblance to the present case, in that the appellant here seems to have asked the Court to issue a notice to the judgment-debtors under Order 21, rule 66, which relates to the settlement of the terms of proclamation, and not under Order 21, rule 22, which relates to the executability of the decree. We do not however know what the terms of the notice was. We must assume that as an order under Order 21, rule 22 was necessary, in view of the fact that more than two years had elapsed from the date of the decree, the notice was under Order 21, rule 22 as well as under Order 21, rule 66. That the second defendant realised that he could raise objections to the executability of the decree is shown by the fact that he later asked the Court to limit the sale to certain items of property. The learned Judges in the Full Bench decision were at pains to point out that their decision was limited to the facts of that case; and it can be distinguished on the ground that no notice under Order 21, rule 22 was there necessary and none was sent.

Although it is the duty of the Court to declare the service to be sufficient if the service is not a personal one, yet decisions of this Court in *In re Sri Krishnadoss*[4] onwards have consistently held that the omission to expressly declare a service sufficient does not mean that there has been no due service. This principle has been very recently stated in *Govinda Krishna Aiyar* v. *Sankaralinga Naicker*[5] and a little earlier in *Venkatarayanim Varu* v. *China Bapanna*[6]. A still earlier decision to the same effect is *Mohamed Meera Rowther* v. *Kader Meera Rowther*[7], which purports to follow *In re Sri Krishnadoss*[4]. The learned advocate for the respondent relies on observations in *Azhagappa Chettiar* v. *Ramanathan Chettiar*[8] and *Ramanathan* v. *Veerappa*[9], which seem to lay down the rule that unless all the formalities that the law prescribes have been strictly complied with, the principle of constructive *res judicata* should not be applied; so that if the Judge omits to declare the service sufficient, the decree-holder cannot rely on this plea. Nevertheless, the learned Judges in *Azhagappa Chettiar* v. *Ramanathan Chettiar*[8], found it necessary to distinguish *Mohomed Meera Rowther* v. *Khader Meera Rowther*[7] on the ground that there it was certain that the judgment-debtor had received notice of the execution of the decree, whereas in the case before them it was not. The facts that called for the observations referred to above in *Ramanathan* v. *Veerappa*[9], were that the decree-holder sought to avail

1. (1923) 45 M.L.J. 346 : I.L.R. 46 Mad. 768 (F.B.)
2. A.I.R. 1928 Mad. 1052.
3. (1941) 1 M.L.J. 271.
4. (1908) 3 I.C. 474.
5. (1942) 2 M.L.J. 558.
6. (1939) 2 M.L.J. 926.
7. (1914) M.W.N. 63.
8. (1932) 64 M.L.J. 629.
9. A.I.R. 1937 Mad. 84.

himself of the failure of the judgment-debtor to raise a plea in a later execution petition and to apply the principle of *res judicata* to an earlier execution petition between the same parties that was decided subsequently. The learned Judges refused to apply it in such a case. An examination of the various decisions indicates that one has to consider the facts of each case and decide on those facts whether the failure to declare a judgment-debtor *ex parte* was a mere omission and the subsequent procedure made it clear that the Judge did consider the service sufficient, or whether the facts of the case left in some doubt the question whether there was a proper service or not. In the present case, the second defendant refused service on the frivolous ground that his father's name was not correct, despite the fact that his father was served at the same time and was a party to the same proceedings. Under such circumstances the executing Court would undoubtedly have considered the service sufficient. When one considers the nature of the excuse offered and the fact that the executing Court immediately ordered " Proclamation and sell," it becomes clear that the executing Court did consider the service sufficient. If the service was sufficient, then the second defendant was bound by all orders passed which impliedly decided any question that he might have raised with regard to the executability of the decree.

I am therefore of opinion that the lower Appellate Court was wrong in refusing to allow execution to proceed against the son as well as against the father. The appeal is allowed with costs in this Court and in the lower appellate Court, and the order of the first Court is restored.

K.S. ——— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

V. Subramania Ayyar, son of Vaidyanatha Aiyar, on behalf of and in the name of the Official Receiver, East Tanjore at Negapatam. *Appellant**

*v.*

Sivakami Achi and another .. *Respondents.*

*Madras Agriculturists' Relief Act (IV of 1938), sections 4 (f), 19 and 20—Stridhanam amount deposited with Nattukottai Chetty firm whose proprietor was also the father-in-law of the bride—Grandson succeeding to proprietorship—Refusal to pay back deposit —Suit for recovery—Compromise decree—Insolvency of judgment-debtor—Official Receiver applies to scale down decree; as also the insolvent—Scaling down refused, liability being held to flow under trust—Authorised creditor representing Official Receiver preferring appeal—Whether appeal is maintainable.*

The stridhanam amount of a bride was deposited with a Nattukottai Chetty firm whose proprietor was also the father-in-law of the bride and interest was allowed to accumulate. The grandson, who succeeded to the proprietorship of the firm and had full knowledge of the circumstances relating to the deposit failed to pay back the amount, whereupon a suit was brought and resulted in a compromise decree. The judgment-debtor became an insolvent and applications were filed by him and the Official Receiver to scale down the decree amount. On refusal to scale down, an authorised creditor representing the Official Receiver preferred an appeal.

*Held,* that where the Official Receiver applies to the Court to scale down the debt due under a decree passed in accordance with a compromise entered into by the parties—the judgment-debtor having become insolvent—and on the application being rejected the matter is carried on appeal to the High Court on behalf of the Official Receiver, the appeal is maintainable inasmuch as section 19 of Act IV of 1938 is wide enough to cover an Official Receiver in whom the estate of the judgment-debtor is vested ; and though generally it is desirable to make the insolvent a party in appeal it is not imperative in cases where any contentions which the insolvent might raise would be the same as those put forward by the appellant himself.

*Palani Goundan v. Peria Goundan,* (1940) 2 M.L.J. 887, followed.

*Held further,* that in the circumstances of the case, the character of the deposit was such as to make the position of its recipient analogous to that of a trustee and the decree that resulted on failure to pay back the amount embodied a liability arising out of a breach of trust and was not liable to be scaled down.

Appeal against the order of the Court of the Subordinate Judge of Devakottah dated 23rd February, 1942 and made in I. A. No. 444 of 1941 in O. S. No. 135 of 1929.

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* A. A. O. No. 475 of 1943. 5th November, 1943.
(C. R. P. No. 1031 of 1942 converted into.)

*S. Panchapagesa Sastri* for Appellant.

*M. Murugappa Chettiar* for Respondents.

The Judgment of the Court was delivered by

*Wadsworth, J.*—The appellant is a creditor acting on behalf of and in the name of the Official Receiver in the insolvency of one Kumarappa Chetti. Kumarappa Chetti's grandfather many years ago on the occasion of the marriage of his son and the husband of the present first respondent, received from the first respondent's family a deposit of the amount of her stridhanam. Following the usual Nattukottai Chetti practice, this money was left in the firm of the father-in-law to accumulate interest for the benefit of the bride and her offspring. The proprietor of the firm and both his sons having died, the insolvent Kumarappa became the proprietor of the firm and continued to hold this deposit along with other moneys of the business. There can be no doubt in the circumstances of the case that when he succeeded to the management of the family firm he must have been fully acquaintted with the circumstances in which this deposit was made. A suit was filed for the return of the deposit with accumulated interest. It resulted in a compromise decree. The judgment debtor having become an insolvent, the Official Receiver moved the trial Court under sections 19 and 21 of the Madras Act IV of 1938 to amend the compromise decree. To meet a possible objection regarding procedure the insolvent also filed a similar application, the two being heard together. The lower Court held that the decree in question could not be scaled down because it embodied a liability arising out of a breach of trust, falling under section 4 (*f*) of the Act.

A preliminary objection was raised that this appeal by an authorised creditor representing the Official Receiver was not maintainable, on the ground that, by section 19, relief is given on an application by the judgment-debtor and that therefore it is only the insolvent who could maintain the application and file the appeal. No procedure is laid down in section 21 of Madras Act IV of 1938 for the application of the Act to the debts of insolvents. But as has been pointed out, it is reasonable that both the Official Receiver and the insolvent should be parties to proceedings in Court arising out of that section. When we turn to section 19 we find that the proceedings have to be instituted on the application of a judgment-debtor. But we have held in *Palani Goundan* v. *Peria Goundan*[1] that the term judgment-debtor used in section 19 must be read widely and that it would cover a purchaser of the rights of the judgment-debtor. Similarly we have no doubt that it would be sufficiently wide to cover an Official Receiver in whom the estate of the judgment-debtor is vested, who is the only person to satisfy the decree-debt. In many cases it would no doubt be desirable that the insolvent should be a party to an appeal from a decision under section 19 read with section 21. But in the circumstances of the present case when any contentions which the insolvent might wish to urge would be the same contentions as those which are put forward by the present appellant, we do not think it necessary to adjourn this appeal for the impleading of the insolvent.

On the merits there is, in our opinion, very little to be said for this appeal. It seems to us clear having regard to the practice of the Nattukottai Chetty community and the circumstances in which this deposit was made that when the first respondent's father-in-law received this money as stridhanam from the first respondent's parents he received it under an obligation to hold it for a particular purpose and that the character of the deposit was such as to make the position of the recipient of the deposit analogous to that of a trustee. When the father-in-law died and the control of the firm passed to his sons and eventually to his grandson each of those persons as proprietor of the firm received its assets including this particular deposit under the same obligations as those which lay upon the original proprietor of the firm. The insolvent Kumarappa when he took over this deposit must have been fully aware that it was a deposit received for a particular purpose

1. (1940) 2 M.L.J. 887.

and held in a fiduciary capacity by the proprietor of the firm. When he himself became the proprietor, he assumed the same character and incurred the same obligations. When therefore he refused to pay back the deposit to the person entitled, he committed a breach of trust. The decision of the lower Court is correct and the appeal is dismissed with costs of the first respondent.

V.P.S. —— *Appeal dismissed.*

## [PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Patna).

PRESENT :—LORD ATKIN, LORD THANKERTON, LORD PORTER, LORD CLAUSON AND SIR GEORGE RANKIN.

Raja Braja Sunder Deb and others .. *Appellants**

*v.*

Bamdeb Das *alias* Patanaik (since deceased) and others .. *Respondents.*

*Malicious prosecution—Person included in charge-sheet but not sent up for trial has no cause of action—Facts to be proved by plaintiff.*

Where in the charge-sheet a person was noted as an accused person not sent up for trial and in fact was not sent up for trial and the case against all the accused was dismissed, such person has no cause of action for malicious prosecution even though the information originally laid did suggest that he was to a large extent responsible for the offence complained of.

In order to succeed in an action for malicious prosecution the plaintiff must in the first instance prove two things : (1) that defendant was malicious and (*ii*) that he acted without reasonable and probable cause. Malice means any wrong or indirect motive, but a prosecution is not malicious merely because it is inspired by anger. However wrongheaded a prosecutor may be, if he honestly thinks that the accused has been guilty of a criminal offence he cannot be the initiator of a malicious prosecution. Malice alone is not however enough. There must also be shown to be absence of reasonable and probable cause.

*Sir T. Strangman* and *C. Bagram* for Appellants.

*W. Wallach* for Respondents.

Their Lordships' Judgment was delivered by

LORD PORTER.—This appeal by special leave from the High Court of Patna dated the 25th January, 1938, raises the question whether the appellants who were plaintiffs in the original suit are entitled to succeed in an action against the defendants for malicious prosecution.

The first plaintiff is the Raja of Aul, once an independent tributary State in Orissa, but now an ordinary Zemindari subject to the laws of British India. He is a Khetriya by caste. The second appellant is the son of the original second plaintiff, Krishna Chandra Jagati, deceased, and has been duly substituted for him in the proceedings. Both the original second and third plaintiffs were servants of the first plaintiff. The first and second respondents are the sons and legal personal representatives of the original first defendant, Bamdeb Das, *alias* Patnaik, who was the father of one Jugal Kishori Das and was related to one Harikrishna Mahanty, now deceased. The second defendant is a nephew of the third defendant, who was a cousin of Harikrishna Mahanty. These two defendants formed a joint Hindu family. The defendants and Harikrishna Mahanty were Karans by caste, a caste regarded as of inferior status to that of the first plaintiff.

The original defendants are said to have prosecuted the original plaintiffs maliciously in the following circumstances.

On the 18th September, 1926, Kanaka, the elder daughter of Harikrishna, was with the consent of her father taken to the household of the first appellant, it was said, by the respondents, in order to become his concubine, but, by the appellants, in order to make a subordinate form of marriage which would give her the status of what is called a Chauki Bai, a position which may perhaps be described as that of a secondary wife. There is no doubt that the other two original plaintiffs were implicated in the removal and no argument to the contrary has been addressed to their Lordships.

That some such status as Chauki Bái may exist appears from a publication called Pachis Sawal, which contains 25 questions addressed to the Rajas and Chiefs

* P. C. Appeal No. 20 of 1941. 5th August, 1943.

of the Regulation and Tributary Mahals by the Superintendent in 1814 and was published under the authority of Government.

Two of these questions may be quoted :

"*Question 2.*—By what titles are the several Ranis distinguished ?

*Answer :* First married is entitled the Pat Mahadae and the rest Mahadae. Besides such those of other castes, kept as Phool Bathees, are entitled " Ranee."

*Question 10 :* On the death of the Raja, suppose he leaves no son born of any of his Ranees but leaves a brother (s) and sons by his Phool Beebahis and concubines and suppose the Ranees have not become " Sutees," who in such a case succeed ?

*Answer :* The Son born of the Phool Beebahi becomes the Raja."

This book has previously been received in evidence by their Lordships; in any case apart from it there is a considerable body of evidence to the effect that the Rajas of Aul were accustomed to take to themselves subordinate wives and without determining the question their Lordships are prepared to decide the present case on the assumption that the Rajas are entitled by custom to take such wives.

On the evening on which his daughter was taken away Harikrishna Mahanty appears to have given a caste feast accompanied by various ceremonies such as might indicate that his daughter was to be taken to the Rajah's palace in order to become a Chauki Bai, and after the feast was over she was carried to the palace in a palanquin accompanied by her brother and the village barber. Moreover, the feast was attended by a considerable number of Karan caste including the first and third defendants though these latter explain their presence by saying that they feared enmity of the Raja if they stayed away.

These circumstances are urged by the appellants as showing that the girl was being given in marriage and not in concubinage, since it is said that if the latter had been intended it would have been an occasion for sorrow and not for feasting and in any case members of her caste would not have attended.

When they reached the palace the barber and the palanquin bearers remained outside, whilst the girl was taken within, and next morning they returned to their own village. Shamsunder Mahanty, the girl's brother, also remained outside and stayed after the barber had left but he was not called as witness and it does not appear that he ever saw his sister again.

In October, 1926, about a month after the girl reached the palace she became ill and died. It is alleged that the doctor who attended her diagnosed her illness as dropsy possibly caused by an attack of malarial fever, but he was not called to give evidence to this effect at the trial, though he was called at the criminal prosecution. During this period she appears to have remained in the harem, but no marriage ceremony took place.

In these circumstances, her taking away, illness and death not unnaturally caused considerable commotion amongst those of her own caste, commotion which accentuated when it was rumoured that Harikrishna was about to send her younger sister to the palace. At any rate it is not surprising that in March, 1927, a meeting was held amongst the Karans, the summons to which was sent out under the signatures of the second defendant and Jugal Kishore, son of the first defendant. The subject for discussion was " ascertainment of social degeneration of the Karans of this part and the remedy therefor."

At this meeting it appears from the programme which was produced in evidence that one subject raised was " reform of the hateful practice prevailing at this place," and it was given in evidence that it was proposed to ostracise Harikrishna for sending his daughter to the Raja. He was not in fact ostracised, 25 voting in his favour and 25 against. He says that the reason for this result was that the custom of secondary marriage was recognised, that he asked pardon and was excused. The fact is undeniable but the exact cause of the result is not directly material.

The next step which led up to the present action was taken by Jugal Kishore Das.

In April, 1927, a police inspector went to the neighbourhood in connection with a petition case in which Jugal Kishore Das was concerned. In the course of his examination by the inspector he made a statement implicating the three appel-

lants and Harikrishna, and of his own accord lodged a First Information Report on the 20th of April, accusing them of selling and buying minor girls for the purpose of illicit intercourse.

Jugal Kishore Das is dead, but it is alleged that Bamdeb Das and the second and third defendants instigated the prosecution and instructed the police and therefore were the real prosecutors. There is evidence to support this allegation though the testimony of the defendants and the general effect of that of the police is against this contention, but the Judge of first instance found it established and their Lordships propose to deal with the case on the assumption that his finding is right.

As a result of the allegations contained in the First Information Report a charge sheet was prepared dated the 20th May, 1927.

In it the first appellant was noted as an accused person not sent up for trial and in fact he never was so sent up. The second and third appellants and Harikrishna were sent for trial, the latter under section 372, Indian Penal Code (selling or letting to hire of any person under eighteen years of age with intent that such person shall be employed or used for prostitution or illicit intercourse or any unlawful or immoral purpose) and the other two under section 373, Indian Penal Code read with section 114, Indian Penal Code (buying, hiring or obtaining any person under eighteen years of age with the like intent). For the purpose of these sections, illicit intercourse is defined to mean "sexual intercourse between persons not united by marriage or by any union or tie which though not amounting to a marriage is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities as constituting between them a *quasi* marital relation."

As a result of this information the second and third appellants were criminally prosecuted . The hearing of this case took place before Mr. B. Misra and was protracted over the space of about a year. Some fourteen witnesses were called on behalf of the prosecution, and after hearing the evidence the learned Magistrate dismissed the case without calling upon the accused persons, and found :

(1) That the age of the girl was between 13 or 14.

(2) That a sum of Rs. 500 was paid for the girl.

(3) That the girl was given to the first appellant.

(4) That she was given as a Chauki Bai and that upon evidence contained in the Pachis Sawal and elicited from the witnesses such a union is at least a recognised tie.

The witnesses were examined and cross-examined at length and inasmuch as the depositions were put in evidence in the present case their Lordships will refer to them in considering the findings at which the Subordinate Judge and the High Court have arrived.

After this decision Harikrishna took no further step but on the 10th June, 1929, the appellants instituted the present suit in the Court of the Subordinate Judge of Cuttack alleging that the original defendants in collusion with one another lodged a criminal information through Jugal Kishore falsely and maliciously implicating the appellants and were the real prosecutors. The learned Subordinate Judge found these charges proved and gave Rs. 6,000 as damages divisible as to the first appellant into a sum of Rs. 2,000 for pain and suffering and Rs. 1,000 for costs and as to each of the other two into Rs. 500 for pain and suffering and Rs. 1,000 for costs.

This finding was reversed by the High Court in a judgment obviously influenced by a strong dislike of the *quasi*-marriage spoken to, and animadverting in very strong terms upon the honesty and capability of the learned Magistrate and the learned Subordinate Judge.

Whilst their Lordships agree with the conclusion reached by the High Court they must not be thought to agree with these observations. The learned Magistrate appears to them to have given a careful and dispassionate consideration to the

matter and to have arrived at a reasonable and they think a justifiable solution. Furthermore whilst they differ sharply in many respects from the conclusions of the learned Subordinate Judge they see no reason to cast aspersions upon his efforts. Their Lordships will consider his more detailed findings at a later stage, but before they do so there is one problem which requires immediate solution, namely :—" Has the Rajah of Aul any cause of action for malicious prosecution ? "

In their Lordships' view clearly he has not : the simple answer is that he was never prosecuted. Their Lordships find themselves in entire agreement with the observations of Harries, C.J., spoken when rejecting the appellant's petition for leave to appeal to His Majesty in Council :

" In my view it is clear that the Raja of Aul had no cause of action for malicious prosecution. He was never in fact prosecuted though the information originally laid did suggest he was to a large extent responsible for the purchase of this girl. Be that as it may, it is clear that no criminal proceedings were ever taken against him, and that being so he could never maintain an action for damages for malicious prosecution."

As regards the other two appellants the learned Subordinate Judge made certain findings which must now be considered:

(*i*) It was alleged by the prosecution that when she was sent to Aul, the girl was between 12 and 13 years of age. The learned Subordinate Judge found that there was no satisfactory and reliable evidence of this allegation. The exact age however is immaterial provided she was under 18 years of age. As to this there is ample evidence. Even the appellants' witnesses do not put her age more definitely than 17 or 18, whilst the doctor and the defendants' witnesses, some of whom were her contemporaries or nearly her contemporaries, put her age at not more than 13 or 14. This evidence commended itself to the learned Magistrate and their Lordships agree with his finding. They would add that there is evidence that one of the respondents' witnesses at the criminal trial obtained a copy of this girl's horoscope and handed it to the police, but that the original was with Harikrishna. The production of the original document would have set the matter at rest but in any case it has to be remembered that the question is not whether the girl was over 18 but whether the respondents reasonably thought she was younger. If the father had, and did not produce, so vital a document, they might well believe the girl was much under the prescribed age. Even if it were incumbent upon the respondents to prove that she was in fact under 18, their Lordships think sufficient proof was given, especially when it is remembered that, if she was not, the whole case breaks down, and yet in an application by the respondents in the criminal proceedings for transfer of the case to another Magistrate it is said only " that the defence of the petitioners is that the girl in question was taken for marriage in Ful Bebahi form . . ."

(*ii*) The learned Subordinate Judge further finds no money was ever paid. As in the case of previous finding, such a contention, if established, would be fatal to the prosecution. Yet it was never mentioned in the petition referred to above. Nor, indeed, was it seriously contested in the criminal proceedings. It is true that the appellants were not called upon to give evidence, but they cross-examined the prosecution's witnesses at length and as the learned Magistrate says, the fact was not categorically denied.

From an examination of the record in the criminal proceedings the witnesses never seem to have been specifically challenged on the matter. It was not until the civil proceedings were heard that it was asserted that no money passed. There is plenty of evidence on behalf of the respondents that it did, and their Lordships again find themselves in agreement with the learned Magistrate. Even if they did not it would be enough if in this matter, as in point (*i*) the respondents honestly believed the girl was bought.

Finally there is the substantial question whether the respondents had reasonable and probable cause for believing that the girl was given in order to become a concubine and not for some *quasi*-marital relationship, and whether they were malicious.

In order to succeed in an action for malicious prosecution the plaintiff must in the first instance prove two things: (*i*) that defendant was malicious and (*ii*) that he acted without reasonable and probable cause.

Malice has been said to mean any wrong or indirect motive, but a prosecution is not malicious merely because it is inspired by anger. However wrongheaded a prosecutor may be, if he honestly thinks that the accused has been guilty of a criminal offence he cannot be the initiator of a malicious prosecution. But malice alone is not enough: there must also be shown to be absence of reasonable and probable cause. If, in the present case, the respondents honestly believed a criminal offence to have been committed and had reasonable cause for so doing, they are not liable in this action, and even though they were malicious they still would not be liable if they had reasonable and probable cause for believing in the appellants' guilt.

In the present case, as in most cases, the two questions are interwoven, but for the sake of simplification their Lordships are prepared to assume without determining that the respondents were prepared to take the opportunity afforded them of making a general attack upon the type of subordinate marriage, which was said to have been intended and to have taken advantage of Harikrishna's action in order to do so. But they may nevertheless have then honestly believed that a criminal offence had been committed and have undertaken the prosecution in that belief. Let it be assumed that at the time when the girl was given away the respondents knew of the claim of the Rajas of Aul that they were entitled by custom to unite themselves with Karans by the method of Ful Bebahi marriage and thereby to give the girl so united to them the status of a Chauki Bai. Still the question arises, had they at the time of the institution of the prosecution good reasons for believing that Kanaka was taken as a concubine and not under this custom. If the question was whether on the occasion of the feast when the girl was actually removed, the respondents had reasonable cause for this belief the matter might be one of doubt. But those are not the circumstances. The girl was taken away and lived in the Raja's harem for a month, but no ceremony was performed. She died in unusual circumstances and if the respondents really were prosecutors they must have known of the statement given by the Raja to the Police before the prosecution took place: a statement which was given in evidence and contained the following assertions. He (that is, the Raja) said that this girl was brought by her father and left in his palace to be used as a Palati. He denied having any personal knowledge of her importation. He continued to say that many people bring in their girls when they are too poor to maintain them and such people are usually allowed to be left in his harem to be used as Palatis or disposed of in marriage to their caste people. He further stated that he heard that the girl was 17 or 18, but he had no occasion to see her. He also denied having issued any order to the other two appellants to bring in the girl, nor did he say that there was any negotiation about the girl with him. He admitted that the girl remained in his harem since she was taken in and she used to be looked after by his maidservants. He gave out that according to his household custom no girl is taken as Chauki Bai, etc., until she is kept under observation for sometime. So there was no certainty in this connection.

The policeman ends the extract from his case diary from which these remarks are taken by saying: "I further examined the proprietor's manager and office superintendent and they also made the same statement as the proprietor and disclaimed all personal knowledge about the girl or of the occurrence."

In the circumstances, such a statement was bound to give rise to the gravest suspicions. So much so, indeed, that the learned Subordinate Judge, taking the view he did, felt himself constrained to disbelieve this statement and to find that the Raja had made false answers to the policeman's questions for fear of criminal proceedings.

In considering whether this inference is true or not, it is noteworthy that the Raja, though he was a plaintiff, was not called on the trial of the action. Even if his statement was untrue their Lordships think it must have established a very

reasonable belief in the minds of the respondents that there never was any question of making the girl a Chauki Bai. Indeed, their Lordships do not think it established that the Raja did intend to do so, much less that the respondents had no reasonable or probable cause for thinking that no marriage of any kind was contemplated.

It is true that the learned Subordinate Judge has found that Harikrishna intended to give his daughter to be a Chauki Bai, but this finding, even if accepted, has no bearing upon the ultimate decision.

In the first place Harikrishna is not a party to the present proceedings, and in the second even if he were, the question would not be what he intended but what the respondents reasonably thought his intentions were.

As it is, what the respondents thought of Harikrishna's action is not directly material. The material question is what was the respondent's reasonable belief as to the circumstances in which and the object with which the second and third appellants took away the girl.

In their Lordships' opinion the respondents might well believe that the appellants' intention was to make her as a concubine; and it certainly has not been proved that there was no reasonable or probable cause for this view. As it was incumbent upon the appellants, if they were to succeed, to prove that no reasonable and probable cause for the prosecution existed, it follows that the appellants have not made out their case, and the suit fails in respect of all three.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal to His Majesty in Council.

V.S. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Gnanasiromani Nadar .. *Appellant**

*v.*

The Nedungadi Bank, Ltd., Madras .. *Respondent.*

*Civil Procedure Code (V of 1908), section 51 proviso, clause* (b) *as amended in 1936 and Explanation—Pensions Act (XXIII of 1871), section 11—Whether pension is subject to attachment—Whether pensioner could claim immunity from arrest as one who has no means to pay decree amount.*

In the case of pensions, after the amount has been paid over to the pensioner, it ceases to be exempt from attachment and so cannot be left out of account for the purposes of clause (*b*) of the proviso to section 51 Civil Procedure Code and the Explanation thereto.

A pensioner who is entitled to a monthly pension of Rs. 129 cannot be deemed to be a person who has no means of paying the amount of a decree obtained against him or a sufficient portion thereof and he cannot claim immunity from being arrested.

Appeal against the order of the District Court of Trichinopoly dated 4th November, 1942 in A. S. No. 287 of 1942 (E. P. No. 149 of 1942 on the file of the Court of the District Munsiff of Trichinopoly, in C. S. No. 137 of 1935 on the file of the High Court, Madras, Original Side).

*S. Amudachari* for Appellant.

*P. S. Ramaswami Aiyangar* for Respondent.

The Court delivered the following

JUDGMENT.—The respondent obtained a money decree against the appellant under which a sum of about Rs. 16,000 is said to be still due. The respondent applied for arrest of the appellant in execution of his decree. The appellant pleaded that by virtue of the provisions of section 51, Civil Procedure Code as amended in 1936 he could not be arrested. Clause (*b*) of the proviso to section 51 and the explanation are relied upon. Clause (*b*) of the proviso so far as it is necessary for this case runs thus :

"Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why

* A. A. A. O. No. 29 of 1943. 11th October, 1943.

he should not be committed to prison, the Court, for reasons, recorded in writing, is satisfied, . . . that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same."

The explanation runs thus :

"In the calculation of the means of the judgment-debtor for the purposes of clause (*b*), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree."

The appellant is a pensioner getting Rs. 129 per mensem. The decree was passed in October, 1937 in C. S. No. 137 of 1935 on the file of the Original Side of the High Court, Madras. The execution petition which now comes before me was filed in 1941. The case of the appellant is that the amount which he receives month by month is exempt from attachment under section 11 of the Pensions Act and that therefore under clause (*b*) of the proviso read with the explanation set out above, the appellant is to be considered to have no means of paying the amount of the decree or a substantial portion thereof. In reply the decree-holder pointed out that even if the defendant had paid a sum of Rs. 25 or thereabouts from the date of the decree, more than Rs. 1,000 would have been paid by the date of the execution petition and that that sum would be a substantial portion of the decree within clause (*b*) of the proviso to section 51. Both the lower Courts came to the conclusion that the appellant cannot be said to have no means to pay the amount of the decree or a substantial portion of it.

In second appeal the appellant's learned advocate urges that under section 11 of the Pensions Act the amount paid to his client is really exempt from attachment. A similar question arose for decision before Ramesam and Cornish, JJ., in *Ranganayaki Ammal* v. *Official Assignee, Madras*[1]. The question there was whether under section 3 of the Provident Funds Act, XIX of 1925, a compulsory deposit paid over to the subscriber was, after it was paid over to him beyond the reach of the Official Assignee. The subscriber had become an insolvent and his property had been vested in the Official Assignee. The insolvent received a large sum by way of provident fund and paid it over to his wife. The question was whether the Official Assignee of Madras was entitled to recover that sum. Reliance was placed on section 3 of the Provident Funds Act and it was argued that under that section, the Official Assignee could not recover that amount. Section 3 of the Provident Funds Act runs thus,

"A compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor, and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to, or have any claim on, any such compulsory deposit."

Section 11 of the Pensions Act with which we are directly concerned is similar in terms and it runs thus :

"No person granted or continued by Government . . . . . shall be liable to seizure, attachment or sequestration by process of any Court in British India at the instance of a creditor, for any demand against the pensioner or in satisfaction of a decree or order of any such Court."

The decision of the Bench above referred to is that after the amount was paid over to the depositor or the subscriber, it ceased to have the character of a provident fund or of a compulsory deposit and that therefore the Official Assignee was entitled to recover the amount from the person to whom it was paid over. The learned Judges pointed out that so long as the amount was still with the Railway company as was the case in that case, the fund was not attachable and that the moment the fund was paid over to the subscriber after maturity, it ceased to retain the character of a compulsory deposit within the meaning of section 3 of the Act. On page 356 they said this :

"In this decision (referring to the decision in *Gauri Shankar* v. *De Cruze*[2] it was observed that a compulsory deposit is only a deposit so long as it remains in the Fund and not after it has been

1. (1930) 61 M.L.J. 354.
2. (1925) 92 I. C. 673.

paid over to the person to whose credit it has hitherto stood. We agree with these observations and dissent from the decision in *Nagindas Bhukandas* v. *Ghelabhai Golabdas*[1]. That being so, we must agree with our learned brother that the payment of Rs. 3,000 which under the circumstances of the case amounted to a voluntary transfer cannot prevail against the Official Assignee and the Official Assignee is entitled to the order against the wife that she would pay down the amount of Rs. 3,000 . . . . ."

The decision applies to this case and I can see no ground on which it can be distinguished.

It was next argued by the learned advocate for the appellant that the Court in this case had not to deal with the question whether the amount of the pension after it has been received by the appellant could be actually seized by way of attachment or not, because that is not the relief which the decree-holder sought in the lower Court and that the only question is whether under clause (*b*) to the proviso to section 51 and the explanation, the amount which is payable month by month ought not to be left out of account in considering the question whether the judgment-debtor has the means to pay the amount of the decree or a substantial portion of it. The answer to this argument is really that which has been given to his first argument. If after the amount of the pension has been paid over to the appellant, the amount ceases to be exempt from attachment, I fail to see how it can be left out of account for the purposes of section 51 proviso, clause (*b*) and the explanation. I consider therefore that the lower Courts were right in holding that the appellant is not a person who has no means of paying the decree amount or a sufficient portion thereof. Whether the whole of the amount which the appellant receives month by month or what portion of it ought to be made available to the decree-holder are questions which should be decided by the executing Court and that question does not arise before me.

The result is that the second appeal is dismissed with costs.

No leave.

V.P.S. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Panchayat Board, Thondi, through its President Mr. S. S. M. Syed Ibrahim Sahib Bahadur .. *Petitioner**

*v.*

T. N. Muhammad Mohideen ... *Respondent.*

*Madras Local Boards Act (XIV of 1920), sections 193, 194. 207 and 212—Erection and working of rice mill—Application for erection—Refusal of licence by Panchayat Board—Subsequent application for same purpose —Matter referred to Health Officer by Board—Order communicated—Applicant erecting and working mill—Licence finally refused—Offence of working mill without licence.*

The accused applied in December 1941 to a Panchayat Board for a licence in which he stated that he proposed to instal and run a rice mill at a particular place. Shortly after the Panchayat Board sent a letter to the accused saying that the locality referred to for the installation was not suitable as it would cause nuisance and inconvenience to the people and that therefore the licence applied for could not be granted. In August 1942 the accused sent another letter to the Board stating that it was in continuation of his previous application and that he was sending a detailed plan in duplicate and prayed that the plan may be approved so as to enable him to start business early. It appeared that the site proposed in the subsequent letter was different from that mentioned in the first application. The Board thereupon intimated to the accused that the plan had been forwarded to the District Health Officer for his opinion and meanwhile the amount remitted by him along with his application was kept under deposit. Two months later the accused was informed that the erection of the rice-mill was unlawful and he was not granted the licence. He was subsequently prosecuted for offences punishable under sections 193, 194 and 207 of the Local Boards Act, the charge being that he erected the mill building without a permit and that he was running the mill without a licence. He was convicted by the trial Magistrate for an offence under sections 193. and 194 of the Madras Local Boards Act. On appeal the Sub-Divisional Magistrate confirmed the conviction under section 194 but acquitted him with reference to the offence punishable under section 193.

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1. (1919) I.L.R. 44 Bom. 673.

* Cr. R. C. No. 594 of 1943. (Cr. R. P. No. 546 of 1943). 9th November, 1943.

*Held in revision* that even if the later application for licence should be treated as a fresh application, inasmuch as the Board had communicated to the accused within one month thereafter that the matter was referred to the Health Officer, that was an order within the meaning of section 212, clause (11) of the Local Boards Act and that the acquittal of the accused for an offence under section 193 of the Act was not warranted.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate, Devakottai, dated 18th March 1943 and passed in C. A. No. 23 of 1943 preferred against the judgment of the Court of the Additional Sub-Magistrate, Tiruvadanai at Devakottai dated 22nd February, 1943 and passed in C. C. No. 75 of 1942.

*D. Munikannaiah* for Petitioner.

*G. N. Chari* for Respondent.

The Court made the following

ORDER.—This is a petition by the Panchayat Board of Thondi for revising the order of the Sub-Divisional Magistrate, of Devakottai setting aside the conviction of the accused under section 193 of the Madras Local Boards Act in C. C. No. 75 of 1942 on the file of the Additional Sub-Magistrate of Tiruvadanai.

The accused applied on the 5th December, 1941 to the Panchayat Board for a licence in which he stated that he proposed to instal and run a rice mill with a 24 H. P. engine driven by crude oil at the place mentioned in the application. On 26th December, 1941, the Panchayat Board sent a letter to the accused saying that the locality referred to for the installation was not suitable as it would cause nuisance and inconvenience to the people and that therefore the licence applied for will not be granted. Subsequently on 10th August, 1942, the accused sent a letter to the Board stating that it was in continuation of his previous application and that he was sending a detailed plan in duplicate and prayed that the plan may be approved at an early date to enable him to start the business as early as possible, to which a reply was sent on 2nd September, 1942, that the plan of the site and the building for the proposed installation had been forwarded to the District Health Officer of Ramnad for his opinion regarding the fitness for the purpose as per Government orders and that the matter will receive attention and that final orders will be issued shortly after its decision and that the sum of Rs. 5-4-0 sent by him by money-order was kept under deposit; *Vide* Exs. C and II. Later on 13th November, 1942, the accused was informed that the erection of the rice mill and the working of the same would be unlawful and that he was not granted the licence. He was prosecuted for offences punishable under sections 193, 194 and 207 of the Local Boards Act, the charge being that he erected the mill building without a permit and that he was running the mill without a licence; he was fined Rs. 50 in respect of the offence punishable under section 194 of the Local Boards Act and Rs. 5 for the offence punishable under section 193. On appeal, the Sub-Divisional Magistrate of Devakottai confirmed the conviction for the offence punishable under section 194 read with section 207 of the Local Boards Act and acquitted him with respect to the other, that is, the offence punishable under section 193 of the Local Boards Act. It is to revise the order acquitting the accused that this petition has been filed.

The appellate Magistrate has found that under section 212 clause 11 of the Local Boards Act, it must be deemed that the licence had been granted to the accused and therefore he should not have been convicted for the offence punishable under section 193 of the Local Boards Act. This is how section 212, clause 11 runs :

"The acceptance by a local board of the pre-payment of the fee for a licence or permission shall not entitle the person making such pre-payment to the licence or permission as the case may be, but only to refund of the fee in case of refusal of the licence or permission ; but an applicant for the renewal of a licence or permission shall until communication of orders on his application be entitled to act as if the licence or permission had been renewed ; and save as otherwise specially provided in this Act, if orders on an application for licence or permission are not communicated to the applicant within thirty days after the receipt of the application by the president, the application shall be deemed to have been allowed for the year or for such less period as is mentioned in the application, and subject to the law, rules, by-laws, regulations and all conditions ordinarily imposed."

In the case Ex. A is the first application and it is therein stated that the accused proposed to instal and run the rice mill and he requested the Board to grant a licence for the same at an early date. It is stated for the Board that this cannot be taken to be an application for a licence to run the mill, because a mill could be run only after it is installed and it could not be installed without permission and therefore till the permission is granted and it is installed, there could be no scope for the application for a licence for running the mill. I do not think I will be justified in accepting this contention, because from Ex. II it is seen that the application of the petitioner which was before the installation was permitted was treated as an application for installation and running of the mill. As a matter of fact, in Ex. A he prays for licence and states that he proposed to instal and run a mill. For installation a permission is required and it is only for running the mill that a licence has to be procured. Ex. A clearly indicates that the accused even in that application applied for a licence. There can be no scope for the application of section 212, clause 11, Local Boards Act, in this case ; as within a month from the date of Ex. A a communication had been sent to the accused, namely, Ex. B stating that the licence could not be granted. The words used there are "the licence applied for will not be granted."

It is, however, urged that Ex. C must be considered to be a later application and since it is dated 10th August, 1942 and Ex. G-8 the order stating that he should not erect the mill is dated 13th November, 1942, and as more than one month has expired after the date of Ex. C the licence must be deemed to have been granted. There is some force in this contention that Ex. C should be taken as a fresh application for licence. It is stated therein that it was only a communication in continuation of his previous application. It is stated by learned counsel for the accused that the place referred to in Ex. C relates to a different place and not to site that was referred to in Ex. A. But then even if Ex. C is treated as a fresh application within a month a communication had been sent by the Board stating that the matter was receiving attention and that it had been referred to the Health Officer and final orders would be communicated only after the matter was ascertained. I therefore do not think that it could be said that this is not an order as contemplated by section 212, clause 11. It may not be an order refusing to grant licence or granting a licence, but it will still be an order in the sense that it communicated to the accused definitely that the question of issuing licence had not been decided and that the Board retained the right to grant or refuse the licence on receipt of further information. In the face of Ex. II, I do not think the Magistrate was justified in finding that there has been no communication of any order within a month from the date of Ex. C and in deeming that the licence was granted.

I therefore set aside the order of the Magistrate setting aside the conviction of the accused for the offence punishable under section 193 of the Local Boards Act and remand the appeal to the Sub-Divisional Magistrate of Devakottai for disposal in the light of the observations contained herein.

B.V.V. — *Case remanded.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Maruthappa Maistriar and others .. *Appellants**

*v.*

Soosai Anthonimuthu Mudaliar and others .. *Respondents.*

*Limitation—Mortgage deed—Amount repayable in instalments—Option to mortgagee to insist on full payment on default of any instalment—Agreement by parties after default to receive payment overdue and to abide by old terms for future payments—Limitation when starts.*

Where a mortgage deed provided for repayment of the amount in instalments and gave an option to the mortgagee to insist upon the whole amount being paid in case of default in payment of any instalment, time does not begin to run immediately on the default and the mortgagee can waive the benefit which is reserved for him under the document.

If after a default occurred, the creditor makes a demand for the entire amount and the debtor immediately approaches the creditor and offers payment of the overdue instalments and requests

* S. A. No. 1355 of 1942 and C.M.P. No. 484 of 1943. 23rd November, 1943.

him to recover further amounts in instalments as provided in the document and the creditor consents, in such a case, limitation does not begin to run against the creditor. That is, after the demand by the creditor for payment of the full amount, both parties agree that the creditor should accept payment of overdue instalments and also receive further instalments according to the terms of the bond, and the arrangement would restore the old state of things and thereafter the creditor on the one side should not take advantage of any default and ask for the entire amount and on the other side limitation does not run against the creditor by virtue of the default which had been condoned by consent of parties.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in A. S. No. 14 of 1942 preferred against the decree of the Court of the District Munsiff of Ambasamudram in O. S. No. 196 of 1940, etc.

*K. Venkateswaran* for Appellants.

*S. Ramaswami Aiyar* and *R. Vaidyanatha Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The suit is upon a mortgage. The only question in this second appeal is whether the suit is barred by limitation. The mortgage was one directing the payment of the amount in instalments. On the point whether the right to sue for the whole amount accrued on the date of the first default there is no room for controversy. It has been decided by the Judicial Committee in *Lasa Din* v. *Gulab Kunwar*[1] that where the wording of the document is as in this case one giving an option to the mortgagee to insist upon the whole amount being paid in case of the default mentioned in the document, time does not begin to run immediately on the default and that the mortgagee can waive the benefit which is reserved for him under the document. This position is not controverted but the appellant seeks to file a notice said to have been issued by the uncle of the first and second respondents in which it is stated that there was a demand for the entire amount soon after the first default occurred. This notice is said to have been issued on the 12th January, 1925, by registered post. The argument is that the creditor exercised his option of insisting upon the payment of the entire amount and that under those circumstances the decision of the Judicial Committee in *Lasa Din* v. *Gulab Kunwar*[1] above referred to does not apply. But this is a case in which admittedly after the notice of the 12th January, 1925, assuming it to be true, there have been payments made for the instalments prior to and after that date and accepted as such by the creditor. In a case where the facts are not complicated by the demand upon the creditor for the entire amount, the authorities are clear that the provisions in the document is to the benefit of the mortgagee who may either enforce it or may not. In the latter case he may sue within the time within which he could have filed the suit if no default had occurred. Even where a notice has been issued by the creditor demanding the entire amount which would be putting into force the clause inserted in the document for his benefit, the question would still arise whether, when later on payments have been made in respect of those instalments the non-payment of which gave rise to the default and accepted by the creditor, the Courts ought not to infer a waiver. It is argued by Mr. Ramachandra Rao, the learned advocate for the appellants, that there is no question of waiver once the creditor makes a demand for the entire amount, but this position is not quite clear. If after a default occurred, the creditor makes a demand for the entire amount and the debtor immediately approaches the creditor and offers payment of the overdue instalments and requests him to receive the further amounts in instalments as provided in the document and the creditor consents, it seems to me that in such a case limitation does not begin to run against the creditor. That is, after the demand by the creditor for payment of the full amount both parties agree that the creditor should accept payment of the overdue instalments and also receive the further instalments according to the terms of the bond; it appears to me that this arrangement would restore the old state of things and that thereafter the creditor on the one side cannot take advantage of the default and ask for the entire amount and that on the other side limitation does not run as against the creditor by virtue of the default which had been condoned by consent of parties. It appears to me therefore that even

1. (1932) 63 M.L.J. 187 : L.R. 59 I.A. 376 : I.L.R. 7 Luck. 442 (P.C.).

if I admit this new document in second appeal the result will be the same and I accordingly decline to allow C. M. P. No. 484 of 1943 and dismiss the same.

In the result, the second appeal fails and is dismissed with costs of respondents 1 and 2. Leave to appeal is refused.

K.C. — *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Ghanta Gopala Rao and others .. *Appellants**

*v.*

Gogineni Venkatramayya .. *Respondent.*

*Transfer of Property Act (IV of 1882), section 53-A—Suit for enforcement of contract of sale and permanent injunction—Whether plaintiff is entitled to temporary injunction.*

Where the plaintiff who was in possession of property, in part performance of an agreement to sell, sued for the enforcement of the contract of sale and for a permanent injunction restraining the defendants from interfering with his possession, and by a separate petition, prayed for a temporary injunction,

*Held,* that the plaintiff was, in the circumstances, entitled to an order of temporary injunction in his favour.

*Probodh Kumar Das* v. *Dantamaru Tea Co., Ltd.,* (1940) 1 M.L.J. 75 : L.R. 66 I.A. 293 : I.L. R. (1940) 1 Cal. 250 (P.C.), distinguished.

Appeal against the order of the Court of the Subordinate Judge of Tenali dated 25th November, 1942 and made in I. A. No. 1066 of 1942 in O. S. No. 46 of 1942.

*B. Sitarama Rao* and *N. V. B. Sankara Rao* for Appellants.

*A. Lakshmayya* for Respondent.

The Court delivered the following

JUDGMENT.—The respondent brought O. S. No. 46 of 1942 on the file of the Subordinate Judge of Tenali for enforcement of his contract of sale dated 25th January, 1941, against the third defendant and for an injunction restraining him and the other defendants from interfering with his possession. He also, by way of a separate petition, prayed for a temporary injunction. It was found that the plaintiff was in possession in part performance of the agreement to sell on 25th January, 1941, and the Subordinate Judge therefore passed an order of temporary injunction in his favour.

The argument of Mr. Sitarama Rao, quoting *Probodh Kumar Das* v. *Dantamaru Tea Co., Ltd.,*[1] is that section 53-A of the Transfer of Property Act only entitles a person in possession in pursuance of an agreement to sell to protection from any action of the transferor or those claiming under him to evict him on the ground that he had no legal title to the property and that the respondent is not therefore entitled to the positive relief of an injunction. It is not desirable that I should say anything on the merits of the prayer for a permanent injunction, but the present application can be distinguished from *Probodh Kumar Das* v. *Dantamaru Tea Co., Ltd.,*[1] on the ground that the present application is one for a temporary injunction only, where the considerations are rather different from those for a permanent injunction and also because in *Probodh Kumar Das* v. *Dantamaru Tea Co., Ltd.,*[1] the person in whose favour the contract had been executed did not sue for specific performance, whereas in the present instance he has. Nevertheless, Mr. Sitarama Rao states that the plaintiff would not be entitled to an injunction until he has perfected his title by a sale deed executed under orders of Court by defendants 1 and 2 in his favour. It is unnecessary to consider this question, for the plaintiff is in possession and it is not certain that he will not succeed in obtaining a permanent injunction. Moreover, as the suit has been pending for more than a year and is therefore likely to be disposed of soon, I do not think it necessary to interfere with the order passed by the lower Court.

The appeal is dismissed with costs.

V.P.S. — *Appeal dismissed.*

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* A. A. O. No. 119 of 1943. 12th October, 1943.

1. (1940) 1 M.L.J. 75 : L.R. 66 I.A. 293 : I.L.R. (1940) 1 Cal. 250 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

Edupuganti Pitchayya and others .. *Appellants**

*v.*

Gonuguntla Venkata Ranga Row .. *Respondent.*

*Madras Agriculturists' Relief Act (IV of 1938) and rules framed thereunder—Mortgage deed—Stipulation for payments spread over nine years against advance of loan—Excess of amount over original advance to be taken as interest—Interest cancellable under Act IV of 1938.*

Where a mortgage deed stipulated for an advance of Rs. 2,500 as loan against which repayments spread over a period of nine years were to be made amounting to Rs. 4,837-8-0 and the excess over the original advance was certainly the compensation which the creditor got for lending his money for the particular period, on an application by the debtor under the rules framed under Madras Act IV of 1938 for a declaration of the amount due,

*Held*, that (1) the fact that the excess was not described in so many words as interest would not alter its character (Halsbury's Laws of England, Vol. XXIII, section 253, referred to) ;

(2) that the whole of the interest as on the 1st October, 1937, was liable to be cancelled under Act IV of 1938 and that the creditor would be entitled only to interest at 6¼ per cent. per annum from the 1st October, 1937, up to the date of payment.

Appeal against the order of the Court of the Subordinate Judge of Masulipatam, dated 9th November, 1942 and made in O. P. No. 16 of 1941.

*A. Lakshmayya* for Appellants.

*K. Kameswara Rao* for Respondent.

The Court delivered the following

JUDGMENT.—The appellants executed a mortgage on 27th September, 1930, in favour of the respondent in respect of a cash advance of Rs. 2,500. The contract stipulated for nine yearly payments, each of a sum of Rs. 537-8-0. It did not state how this annual instalment was made up. It also stipulated that if any instalment was overdue, it would carry compound interest with annual rests at Rs. 1-9-0 per cent. per mensem. The appellants applied to the lower Court under the rules framed under Madras Act IV of 1938 for a declaration of the amount due. The lower Court has come to the conclusion that by the terms of this contract no interest was payable except under the default clause and that the whole of the sum repayable in instalments, namely, Rs. 4,837-8-0 was the principal and no portion of it was liable to be cancelled under Act IV of 1938. I am unable to agree with this view.

It is true that the contract does not in terms say that each instalment shall represent so much interest and so much principal ; but undoubtedly the contract stipulates for an advance of Rs. 2,500 against which repayments spread over a period of nine years shall be made amounting to Rs. 4,837-8-0. The excess over the original advance is certainly the compensation which the creditor gets for lending his money for the particular period. The fact that it is not described in so many words as interest will not alter its character. Halsbury's Laws of England, Volume XXIII, section 253 defines interest as follows :—

"Interest when considered in relation to money denotes the return or consideration or compensation for the use or retention by one party of a sum of money or other property belonging to another."

Undoubtedly the excess over Rs. 2,500 repayable by the debtors in this case is the compensation to the creditor for the use of his money. The definition of interest in the English Moneylenders' Act, after excluding certain charges, says :

"But save as aforesaid, interest includes any amount, by whatsoever name called, in excess of the principal paid or payable to a moneylender in consideration of or otherwise in respect of a loan."

The word 'interest' has a basic meaning of advantage or profit. When used with reference to a loan, interest means the profit or advantage of the creditor which he gets by giving to another the use of his money. If the contract stipulates that for the use of the creditor's money a certain profit shall be payable to the creditor, that profit is interest, by whatever name it is called, or if it is called by no name at all. Applying Act IV of 1938 to the present contract it is clear that the principal

* A. A. O. No. 64 of 1943. 20th October, 1943.

is Rs. 2,500. The only payment was an open payment of Rs. 150 made on 23rd July, 1931. The whole of the interest as on 1st October, 1937, is cancelled and the creditor is entitled to Rs. 2,350 with interest at 6 per¼ cent. per annum from 1st October, 1937. The appellants are entitled to their costs here and in the Court below.

K.C. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Muttalif *alias* Muhammad Abdul Kadir and others .. *Appellants**

*v.*

Meenakshi Sundaram Pillai and another .. *Respondents.*

*Civil Procedure Code (V of 1908), section 51, proviso and Order 21, rules 17, 37 and 40—Decree-holder not barred from executing decree by arrest for reasons given in the proviso—Discretion of Court whether or not it will order arrest.*

Though a decree-holder may not be debarred from executing his decree by arrest of the judgment-debtor because of the reasons given in the proviso to section 51, Civil Procedure Code, yet the section does not preclude the executing Court from exercising a discretion, whether or not it will order arrest.

Reading Order 21, rules 37 and 40 together it is clear that the Court has no discretion to refuse arrest in cases where the judgment-debtor does not appear; but it has a discretion where the judgment-debtor does appear.

*Hargobind Kishanchand* v. *Hakim Singh,* (1925) I.L.R. 6 Lah. 548, distinguished.

Appeals against the orders of the Court of the Subordinate Judge of Sivaganga dated 15th August, 1942 and 28th October, 1942 and made in E. P. Nos. 59 and 107 of 1942 respectively in O.S. No. 18 of 1930.

*V. Ramaswami Aiyar* for Appellants.

*K. S. Champakesa Aiyangar* and *Srinivasan and Srinivasan* for Respondents.

The Court delivered the following

JUDGMENT:—The appellants held a preliminary mortgage decree against the respondent and others, whose appeal to this Court was dismissed with costs. The appellants thereupon sought to execute their decree for the costs awarded in this Court by arresting the respondent (second defendant). The learned Subordinate Judge in a very short order agreed with the contention of the appellants that the second defendant was liable personally for costs; but he passed an order that the appellants should first proceed against the hypotheca, then sell the attached properties (not included in the hypotheca), and that if all these properties were not sufficient, arrest might again be applied for. The appellants claim to be aggrieved, because the learned Subordinate Judge did not consider the various points put forward by them in their affidavit as reasons why the respondent should be arrested.

Under section 51, Civil Procedure Code, the Court is bound to refuse to arrest a judgment-debtor under certain contingencies; and as the learned Judge has not considered whether that proviso applies, we must assume for the purpose of argument in this appeal that the appellants were not debarred from executing their decree by arrest because of the reasons given in the proviso to section 51, Civil Procedure Code. Even though the decree-holders were not debarred from executing their decree because of the proviso to section 51, Civil Procedure Code, it does not in my opinion prevent the executing Court from exercising a discretion whether or no it will order arrest. It is true that Order 21, rule 17 (4), Civil Procedure Code, says that:

"When the application is admitted . . . . the Court shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application";

but Order 21, rule 40 (3) says that after hearing the decree-holder (for the purpose of seeing whether the judgment-debtor can claim exemption) "the Court may, subject to the provisions of section 51 and to the other provisions of this Code, make order for the detention of the judgment-debtor. . . . ." It is contended by the learned advocate for the appellants that the word "may" here does not imply

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* A. A. O. Nos. 12 and 89 of 1943. 11th October, 1943.

a discretion. I am reluctant to interpret this rule as meaning something different from what the words suggest. Moreover, in Order 21, rule 37, Civil Procedure Code, we find that where the judgment-debtor does not appear in obedience to the notice of the Court issued upon an application for arrest being made, "the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor." It therefore seems, reading Order 21, rule 37 and Order 21, rule 40 together, that the Court has no discretion where the judgment-debtor does not appear; but that it has a discretion where the judgment-debtor does appear. The learned advocate for the appellants relies on *Hargobind Kishanchand* v. *Hakim Singh*[1], as indicating that the wording of Order 21, rule 17 above referred to leaves no discretion to the Court, that the decree-holder has a choice as to the method of execution, and that the Court is bound to act in accordance with his request, unless he asks for simultaneous execution in two different ways, when the Court may proceed in execution by one way alone. I do not however think that the learned Judges in *Hargobind Kishanchand* v. *Hakim Singh*[1], laid down quite such a wide principle as Mr. Satyanarayana Rao suggests. They were dealing with a case in which a simple money decree was being executed. The prayer was for the arrest of the judgment-debtor or for the attachment and sale of his property; and the learned Judges held that the reason given by the lower Court, namely, that the decree-holder had an alternative remedy, was not a sufficient reason for refusing the arrest of the judgment-debtor. There can be no doubt that where a simple money decree is being executed the decree-holder ought not to be refused execution by way of arrest, but it seems to me rather different where a mortgage decree is being executed. In this case, the decree-holders held a personal decree for costs against the judgment-debtor; and there can be no doubt that one of the ways in which they can execute that decree for costs is by way of arrest of the judgment-debtor. At the same time, they have necessarily to execute their mortgage decree only by sale of the hypotheca; and if it is possible to realise the costs of the appeal in the same way, then it would seem unnecessary to order the arrest of the judgment-debtor also. I am not prepared to say, therefore, that the learned Judge had no jurisdiction to pass the order he did.

I am told from the Bar that subsequent to the passing of the order appealed against the hypotheca has been sold and has not realised a sufficient sum to discharge the whole of the decree-debt. If that is so, then the appellants will necessarily have to execute their decree for the balance of the decree amount personally against the judgment-debtor. So, whatever may be the order I pass in appeal, it will not affect the remedy of the appellant. In the light of subsequent events, it appears that the appellants were justified in saying in their application that it would be impossible for them to realise the costs by the sale of the hypotheca; but the learned Subordinate Judge was not in a position to be sure of that at the time when he passed his order. Since it may be possible to argue that as a result of the order of the Subordinate Judge the attachment of the other property was automatically raised, it will hereby be ordered that the attachment should continue.

Under the circumstances, the appeal is dismissed without costs.

*A. A. O. No. 89 of 1943.*—This application was against an order refusing to consider an application for the attachment of movables. Much the same can be said with regard to this application as to the application considered in A. A. O. No. 12 of 1943. This appeal has been rendered fruitless by the subsequent sale of the hypotheca. The learned Judge has ordered the petitioners to renew their application if necessary after the hypotheca has been sold. As the hypotheca has now been sold, the appellants, even if they were to succeed in this Court, would have to comply with the learned Judge's order.

This appeal is also dismissed without costs, except that it is ordered that the attachment of such properties as had been already attached shall continue.

V.P.S. ——— *Appeals dismissed.*

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1. (1925) I.L.R. 6 Lah. 548.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

N. M. S. N. S. Kannappa Chettiar *alias* Lakshmanan Chettiar .. *Appellant**

*v.*

N. M. L. Subramanian Chettiar and others .. *Respondents.*

*Provincial Insolvency Act (V of 1920), section 68—Right of insolvent to apply to set aside sale by Official Receiver—Objection relating only to manner of conducting sale—No allegation of fraud or illegality—Insolvent not a 'person aggrieved' by the act of the Official Receiver entitling him to apply under section 68 to set aside the sale.*

Where the complaint of an insolvent against the sale of his property by the Official Receiver was that it was sold for an inadequate price, that it was not properly described in the sale proclamation, that there was no due and proper proclamation and that the manner in which the sale was conducted was improper,

*Held*, that the objections being only as regards the manner in which the estate was sold, in the absence of any allegation of fraud or illegality or mutual mistake between the buyer and seller, the insolvent could not be said to be a 'person aggrieved' by the act of the Official Receiver entitling him to file an application under section 68 of the Provincial Insolvency Act to set aside the sale.

Appeal against and petition praying that the High Court will be pleased to revise the order of the District Court of Ramnad at Madura dated 24th December, 1942, and made in A. A. O. No. 38 of 1942, preferred against the order of the Court of the Subordinate Judge of Devakottai dated 14th February, 1942 and made in I. A. No. 110 of 1941 in I. P. No. 33 of 1936, etc.

*C. S. Venkatachariar* and *P. S. Sundaram* for Appellant.

*A. C. Sampath Aiyangar* and *S. Krishnamachariar* for Respondents.

The Court delivered the following

JUDGMENT.—These arise out of two petitions filed by the insolvent in I. P. No. 33 of 1936 on the file of the Subordinate Judge's Court of Devakottai for setting aside the sales held by the Official Receiver of Ramnad in respect of a house in Karaikudi and of a village in Palni Taluq by name Kallakadu. C. M. A. No. 120 of 1943 and C.R.P. No. 450 of 1943 relate to the sale of the house in Karaikudi, while the other two relate to the sale of the village of Kallakadu. The parties have chosen to file both the Civil Revision Petition and the Civil Miscellaneous Appeal as they were not sure whether an appeal would lie or not. The insolvent's case was that the house in Karaikudi which was a big double storied house with a garden situated in the central place in Karaikudi, was worth about Rs. 3,000 and that it had been sold for a low price of Rs. 1,820. His complaint was that the property had not been properly described in the sale proclamation, that the municipal tax and several particulars were not given, that there was no due and proper proclamation and that sufficient time was not given between the date of the proclamation and the date of the sale. He further complained that the sale was originally fixed for 9th April, 1941, that there were no other bidders except the second respondent, that it was advertised for sale in the "*Swadesamitran*" paper of 11th April, 1941, that the sale was extended by a week and that the sale will be concluded by 3 P.M. on the 16th April, 1941, but on that day the Official Receiver was not present. Though several bidders had come to bid at the sale without giving any information as to whether the sale was adjourned the sale was concluded in favour of the second respondent on 17th April, 1941. Though the original upset price was fixed at Rs. 5,000, the sale was concluded only for Rs. 1,820. With regard to the village of Kallakadu, it belonged to the family of the insolvent. The property was burdened with a trust, namely, an annadanam charity, and was according to an arrangement entered into by the members of the family of the insolvent, managed by the three divided branches by turns. It is his further case that the village would yield an income of about Rs. 5,000 per year out of which Rs. 3,000 only would be utilised in the conduct of annadanam charity and the balance could be utilised by the insolvent. It had been held in prior proceedings of this Court that the insolvent had a saleable interest in the village and that was why the Official Receiver brought it for sale. The insolvent's complaint was that without ascertaining what the

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* A. A. O. Nos. 120 and 121 of 1943 and C.R.P. Nos. 450 and 451 of 1943. 2nd November, 1943

nature of the interest of the insolvent was, the property had been sold for an inadequately low price. With regard to the sale, he has got the same complaint as in respect of the sale of the house. The sale was originally poste' for the 16th but was not taken up on that day and was adjourned to the 17th. It was further stated that there was no correct description of the properties and of the exact nature of the interest possessed by the insolvent.

A preliminary objection was raised in both the petitions that they were not maintainable under section 68 of the Provincial Insolvency Act. The learned Subordinate Judge relying on the decisions in *Hari Rao* v. *Official Assignee, Madras*,[1] which referred to that in *Sakhawat Ali* v. *Radha Mohan*[2] with approval, and the decision in *Venkataramayya* v. *Bangarayya*[3] came to the conclusion that an insolvent was not a person aggrieved so as to entitle him to file an application under section 68 of the Provincial Insolvency Act. On appeal, the learned District Judge, observing that the decisions of this Court relied on by the learned Subordinate Judge related to appeals against orders made by Insolvency Courts and not to applications to set aside acts, such as sales held by the Official Receiver, and after referring to the ruling in *Kundu Singh* v. *Official Receiver*[4], which the learned Subordinate Judge refused to follow in view of the fact that he was bound by the decisions of this Court, found that the petitions were maintainable and remanded them to the lower Court for fresh disposal on merits. Hence these petitions and appeals.

The two decisions of this Court relied on by the learned Subordinate Judge referred to above were no doubt not with reference to section 68 of the Provincial Insolvency Act. The decision in *Hari Rao* v. *Official Assignee, Madras*,[1] was a decision on a petition filed under section 82, Presidency Towns Insolvency Act, which corresponds to section 75 of the Provincial Insolvency Act. The decision in *Venkataramayya* v. *Bangarayya*[3] is also a decision on an application filed under section 75, though it is wrongly stated in the headnote as one relating to section 68. But then the relevant words in both sections 68 and 75 are the same. Section 68 runs thus :

> " If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just."

Section 75 runs thus :

> " The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal . . . ."

Subsequent to the filing of these proceedings, in *Chennabasavappa* v. *Official Receiver, Bellary*,[5] Horwill, J., sitting singly, held, following the observations in *Hari Rao* v. *Official Assignee, Madras*,[1] that the insolvent had nothing more than a hope that something might be left over if the estate was administered and he was not a person aggrieved and that therefore the petition under section 68 of the Provincial Insolvency Act was not maintainable by the insolvent. It was urged before me for the insolvent that the decision in *Sakhawat Ali* v. *Radha Mohan*[2], which was followed with approval in *Hari Rao* v. *Official Assignee, Madras*,[1] proceeded on the basis that the insolvent had no legal interest in the property as it was vested in the receiver and that his interest in the surplus was not a legal interest but a mere hope or expectation and that for this position reliance was placed on the observations of James, L.J., in Ex parte *Sheffield*: In re *Austin*[6], and In re *Leadbitter*[7]. In *Venkataramayya* v. *Bangarayya*[3] also, there is the following observation :

> " It is quite clear that both thr Full Bench decision of this High Court (in *Hari Rao* v. *Official Assignee, Madras*[1]) and the Allahabad decision (*Sakhawa tAli* v. *Radha Mohan*[2]) are based upon the view taken by the English Courts with regard to whether or not an insolvent person is under certain circumstances an " aggrieved " person and reliance is placed in both those cases upon the observations of James, L.J, in Ex parte *Sheffield*, In re *Austin*[6], and on the case of In re *Leadbitter*[7]. It was stated by James, L.J., in the former case that the insolvent has no legal interest in the surplus which may be left

1. (1926) 50 M.L.J. 58 : I. L. R. 49 Mad. 461 (F.B.).
2. (1918) I.L.R. 41 All. 243.
3. (1934) 67 M.L.J. 942.
4. A.I.R. 1939 Lah. 499.
5. (1943) 1 M.L.J. 127.
6. (1879) 10 Ch. D. 434.
7. (1878) 10 Ch. D. 388.

over as a result of his insolvency but has merely a hope or expectation and that the mischief of allowing a bankrupt on the contingent chance of his ultimately acquiring title to some surplus which might never be realised, to interfere with and embarrass the administration of the estate would be immeasurable.'

Horwill, J., in *Chennabasavappa* v. *Official Receiver, Bellary*,[1] points out that,

> " Coutts-Trotter, C.J., in *Hari Rao* v. *Official Assignee, Madras*,[2] discussed certain English cases on the subject and pointed out that the insolvent had nothing more than a mere hope that something might be left over if the estate was administered, and that that would not make him a person aggrieved."

In *Paruk* v. *Mohan Gopal Jew*[3], Lort-Williams, J., pointed out that the statements in the English decisions referred to above on which *Hari Rao* v. *Official Assignee, Madras*,[2] and the other cases referred to above were based cannot be taken to mean that the insolvent in every case of sale of his property by the Official Assignee has no right to make an application to the Court under section 86 of the Presidency Towns Insolvency Act (corresponding to section 68 of the Provincial Insolvency Act). He also quotes the following observations of Farwell, J., in the case of *Bird* v. *Philpot*[4]

> " It has been said that Ex parte *Sheffield* : In re *Austin*,[5] and In re *Leadbitter*[6] decided that a bankrupt cannot deal with the possibility of surplus until all the debts in the first bankruptcy have been paid and the surplus has been ascertained. I do not think that these decisions decided anything to that effect at all. If they did, they would have overruled prior decisions—of the Lord Chancellor amongst others—which were not referred to and they would be, in my opinion, contrary to the whole spirit and principles on which the Bankruptcy Act is now built. As I read the Bankruptcy Act, the trustee takes all the bankrupt's property for an absolute estate in law, but for limited purposes, namely, for the payment of the creditors under that bankruptcy and that bankruptcy only—payment of principal and interest, and all the costs of the bankruptcy. Subject to that, he is a trustee for the bankrupt of the surplus."

The decision in In re *Leadbitter*[6] and Exparte *Sheffield*: In re *Austin*[5] have been understood as stating that an undischarged bankrupt cannot have a right to interfere with the administration of the estate by the trustee in bankruptcy. Mukherjee, J., pointed out that an insolvent is one of the persons included in the category of persons entitled to move the Court under section 86 and that as the sale of the insolvent's property is an act on the part of the Official Assignee he would be entitled to invoke the provisions of the section. The word " insolvent " finds a place in section 68 of the Provincial Insolvency Act. It was also pointed out that the " question as to whether the bankrupt has a legal grievance or not would depend upon the nature of the case he succeeds in making." It was further pointed out that " if he cannot impute fraud to the Assignee or assail the legality of his action and his only grievance is as regards the manner in which the work of administration is carried on, the grievance would not be a legal grievance, and he would have no right to invoke the provisions of section 86 of the Presidency Towns Insolvency Act." Derbyshire, C.J., points out that the sales could be set aside by the insolvent only " if it were proved that there had been fraud on the part of the Official Assignee, some illegality in the sale which went to the root of it, or some mutual mistake on the part of those selling and those buying." In this case, none of the charges against the Official Receiver amount to fraud or illegality nor is there any allegation of mutual mistake on the part of buyer and seller. Learned counsel for the respondent wants me to refer the matter to a Full Bench in view of the observations of the Calcutta High Court with reference to the decision in *Hari Rao* v. *Official Assignee, Madras*,[2] but I do not think in this case it is necessary to do so, because it is pointed out even by the Judges of the Calcutta High Court that in cases of this kind, where the objection of the insolvent is only as regards the manner in which the estate is administered and no fraud or illegality or mutual mistake is alleged he could not be said to be a person who is aggrieved by the order. In these circumstances, I find that the learned Subordinate Judge was perfectly justified in finding on the allegations in the petitions filed by the insolvents that the insolvent

1. (1943) 1 M.L.J. 127 at p. 128.
2. (1926) 50 M.L.J. 358 : I.L.R. 49 Mad. 461 (F.B.).
3. (1940) 44 C.W.N. 665.
4. (1900) 1 Ch. 822.
5. (1879) 10 Ch.D. 434.
6. (1878) 10 Ch.D. 388.

could not be said to be a person aggrieved by the act of the Official Receiver entitling him to file the petitions under section 68.

The Lahore High Court has taken a different view from the decision of the Full Bench in *Hari Rao* v. *Official Assignee, Madras,*[1] referred to above, but I do not think I will be justified in acting on this decision. Learned eounsel for the respondent also cited a number of decisions which I do not think it is necessary to refer to, because they relate to the right of the insolvent after adjudication to take steps under Order 21 rule 90 as also under the Agriculturists' Relief Act. The language used in those enactments is different, and has therefore no bearing on the question at issue in this case.

In the result, both the petitions and the appeals are allowed and the order of the learned District Judge allowing the appeal is set aside, with costs in all the three Courts in the appeals. I make no order as to costs in the petitions, as there was no necessity to file those petitions in view of the fact that an appeal lies.

V.S. ——— *Petitions and appeals allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AYYAR.

Messrs. Manasseh Film Co., by its partners, A. Thiruvengada Mudaliar and his minor son Soundararajan represented by his father the said A. Thiruvengada Mudaliar .. *Plaintiffs**

*v.*

Gemini Pictures Circuit, Producers and Distributors of Motion Pictures, Madras .. *Defendants.*

*Indian Contract Act (IX of 1872), sections 56 and 65—Firm in Singapore advancing money under a contract —Territory overrun by enemies—Members of the firm returning to British India—Suit for recovery of money advanced on the ground of the impossibility of performance of contract—Whether suit lies—Whether plaintiff is "alien enemy"—Civil Procedure Code (V of 1908), section 83—Defence of India Act, 1939 and Rules framed thereunder.*

The overrunning of an allied country by the enemy does not by itself render a person resident in such a country or a company incorporated in such country and carrying on business there an alien enemy.

A contract to do an act which, after the contract was made, has become impossible becomes void when the act becomes impossible. When a contract becomes void any person who has received any advantage under the contract is bound to restore it or to make compensation for it to the person from whom he received it. The rule in *Chandler* v. *Webster,* (1904) 1 K.B. 493, is not the law under the Indian Contract Act.

*Fibrosa Spolka Akcyjna* v. *Fairburn Lawson Combe Barbour, Ltd.,* (1942) 2 All.E.R. 122, applied.

Where a British Indian subject who was doing business at Singapore and now resident in British India, had in November, 1941, at Madras hired a picture for exhibiting the same in the Federated Malay States advancing a sum of Rs. 4,500 to the defendant and the understanding was that the delivery of the film by the producers (the defendant) in British India was to be on the 1st March, 1942, but before the plaintiff could take delivery the Federated Malay States passed under the military occupation of an enemy power (Japan) and he thereupon sued for the return of the money,

*Held,* that the plaintiff was entitled to the recovery of the money advanced by him inasmuch as the contract itself had become impossible of performance.

Rule 97 clause (*b*) of the Defence of India rules can have no application as the plaintiff was not 'resident in enemy territory' as such.

*K. Narasimha Ayyar* instructed by *V. N. Srinivasa Rao* for Plaintiffs.

*V. C. Gopalaratnam* for Defendants.

The Court delivered the following

JUDGMENT.—The plaintiff is a firm called Manasseh Film Company and its only partners are A. Thiruvengada Mudaliar and his undivided minor son Soundararajan. The suit has been brought for the recovery of a sum of Rs. 4,500 which the plaintiffs paid to the defendants—Gemini Pictures Circuit—in connection with the hiring of a picture called Baktha Naradar which was being produced by the defendants at Madras and which the plaintiffs wanted to exhibit in the Federated Malay

1. (1926) 50 M.L.J. 358 : I.L.R. 49 Mad. 461 (F.B.).

* C.S. No. 87 of 1942. 17th February, 1943.

States, Singapore and Penang. The hiring was to be for a period of three years in consideration of a payment of Rs. 9,000. It is stated in the plaint that the understanding between the parties was that the delivery of the picture was to be on the 1st March, 1942. Owing to the outbreak of war between Japan and Great Britain, the contract became impossible of performance and hence the plaintiffs seek a return of the sum paid by them together with interest, which they have roughly fixed at Rs. 5,050, apparently to bring the suit in the High Court, as otherwise it would have had to be instituted in the City Civil Court with heavier court fees.

The main defence is that there was no such frustration of venture as to justify the plaintiffs in demanding a return of the money paid by them. The defendants do not admit that delivery of the picture was to be on the 1st March. They also put the plaintiffs to proof of the fact that the firm consisted of no others besides Thiruvengada Mudaliar and his undivided son.

At the trial, Mr. V. C. Gopalaratnam appearing for the defendants wanted to raise a point of law, namely, that as the plaintiffs were alien enemies according to their own showing in the plaint, the suit could not be maintained. He filed a Judge's summons for this purpose and I allowed him to raise the question.

On the evidence given by A. Thiruvengada Mudaliar for the plaintiffs—and none was examined for the defence—it is clear that he and his undivided minor son are the only proprietors of the firm. There was another partner called Manasseh prior to February, 1940; but the partnership was then dissolved. He had also stated that it was agreed that the picture should be delivered by the 1st March, 1942.

Mr. Gopalaratnam conceded very properly that he could not maintain the position that there was no frustration of adventure and that his clients were not under a liability to return the sum of Rs. 4,500 which they had received in connection with the exhibition and the exploitation of the picture in the Federated Malay States, Singapore and Penang. He would not have made this concession if the law was really as laid down in *Chandler* v. *Webster*[1]. But the latest decision of the House of Lords in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*[2] has laid down that the proposition of law in *Chandler* v. *Webster*[1] could not be supported and that the decision should be overruled.

Therefore the learned advocate for the defendants had to pin his faith on the new objection that the plaintiffs were alien enemies. It is for the defendants, who say that the plaintiffs are alien enemies, to make out that there are facts and circumstances which will bring them within this description in the eye of the law. The allegations in paragraphs 3 and 4 of the plaint were relied on in this connection. They are to the effect that the company was formed in the Straits Settlements at Singapore to distribute and exhibit talkies and movies, that the plaintiffs had been residents of Singapore for a long period, and that, when the first plaintiff came over to Madras in or about October, 1941, he had authorised one Mr. Wong Si Loong by means of a power-of-attorney to act on his behalf in connection with the affairs of the company during his absence from Singapore. The suit contract was concluded at Madras in the month of November, 1941, as the receipt for the payment of Rs. 4,500, marked Ex. P-1, dated 4th November, 1941, would show. In his affidavit dated 30th June, 1942, in support of the application for permission to act as the next friend of his son, the first plaintiff stated once again that he and his son were the "proprietors of Manasseh Film Co., formed and run by us at Singapore." It was urged that on these statements made by the plaintiffs themselves they were alien enemies and that they could not maintain the suit.

Apart from English decisions on the subject, the question whether a person is an alien enemy has to be determined on the terms of section 83 of the Civil Procedure Code and the Defence of India Act, 1939, and the rules thereunder. The plaintiffs are not alien enemies by reason of their nationality. They are not Japanese or Germans, but Indian subjects of the Crown, now residing in British India. Even alien enemies permitted to reside in British India, which permission may be presumed

1. (1904) 1 K.B. 493. 2. (1942) 2 All. E.R. 122.

from the mere fact that they are residing in British India without objection can institute a suit in British Indian Courts as if they were subjects of His Majesty. The explanation to section 83 of the Code does not apply for several reasons. First of all, the plaintiffs are not residing in a foreign country. Secondly, the words, "The Government of which is at war with the United Kingdom of Great Britain and Ireland" mean obviously the lawful or recognised Government of the foreign country in question. It can have no application to such Government as may prevail temporarily at Singapore owing to its military occupation by the enemy, a government to which no recognition has been given or could be accorded by Great Britain. Holland, for instance, occupied by Germany cannot be said to be at war with us; on the other hand it is our ally with its government functioning in England for the time being. Thirdly, there is nothing whatever to show that the plaintiffs are carrying on business "in that country" that is, a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland. They were carrying on business till October, 1941, in Singapore and it was no doubt intended by the power-of-attorney that was given to Mr. Wong Si Loong that the business was to be continued even after the plaintiffs left the place. But there are no data for holding that the business is still being continued notwithstanding the declaration of war between Japan and Great Britain in December, 1941, unless we are to presume that a state of things which continued till October, 1941, is still continuing notwithstanding the outbreak of hostilities and the military occupation of Singapore by the enemy. Such a presumption would be unwarranted. The overrunning of an allied country by the enemy does not by itself render a person resident in such country or a company incorporated in such country and carrying on business there an alien enemy. This position is laid down in the case of In re *An Arbitration*,[1] and can be deduced from a proper interpretation of the language of the explanation to section 83 of the Code. Whether the word "and" in that section was deliberately used to postulate the need for the existence of both the conditions before a person could be treated as an alien enemy, or whether it was meant to convey the disjunctive "or" and one of the requisites is alone enough to make a person an alien enemy, there should be, in either view, a foreign country, the Government of which is at war with the United Kingdom of Great Britain and Ireland. Residence in any other foreign country—we shall assume for the purpose of this case that Singapore was and is a foreign territory—or the mere carrying on of business in such country is not enough to render the person or the company an alien enemy disentitled to sue in British Indian Courts.

It was urged strenuously by the learned advocate for the defendants that a different result followed from a consideration of the Defence of India Act, 1939, and the rules framed thereunder, and he referred to the definitions of "enemy" and "enemy territory" given in rule 2 and to the rules commencing with rule 97 in Part XV of the said rules. "Enemy" is a person or State at war with His Majesty, and "enemy territory" includes "any area which is administered by, or for the time being in the occupation of a State at war with His Majesty." The plaintiffs are not at war with His Majesty. Singapore, no doubt, is now administered by or is in the occupation of Japan, which is a State at war with His Majesty and may be said to be "enemy territory" for this reason. But this interpretation does not take note of the further words found in sub-clause (*a*) of clause (2) of rule 2, namely, "not being an area in the occupation of His Majesty or of a State allied with His Majesty." These words cannot mean the existing state of affairs but have obvious reference to the nature of the area before it was occupied by the enemy. If the area was in the occupation of His Majesty or of a State allied with His Majesty, the mere fact that it has been overrun by an enemy and is in the military occupation of that enemy for the time being will not render the territory "enemy territory" within the meaning of rule 2. Let us now look at Part XV. There is nothing in the rules contained in this Part which can be said to widen the definition of "enemy" or "enemy territory" and bring within its scope persons

1. (1942) 1 K.B. 222.

who would not otherwise be such. Clause (*b*) of rule 97 does not apply because the plaintiffs are not "resident in enemy territory." Clause (*c*) has no application either as they are not a "body of persons constituted or incorporated in enemy territory, or in, or under the laws of, a State at war with His Majesty." They have not been declared by the Central Government to be enemies, to attract clause (*d*). Clauses (*e*) and (*f*) alone remain for consideration. Clause (*e*) can be ruled out as the company is not "controlled by a person who, under this rule, is an enemy." Clause (*f*) will come in only if it is established, the burden being on the objector to the suit to prove this, that the individual or body of persons is carrying on business in enemy territory as defined by the rules. The other rules that were referred to, namely, rules 98, 99 and 104 and sub-rule (4) of rule 114 are all dependent upon the applicability of rule 97. As there is no "enemy" or "enemy territory," the very foundation of the objection is demolished.

In the course of his argument, Mr. Gopalaratnam referred to *Porter* v. *Freudenberg*[1] *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.*[2] and *Jenson* v. *Driefontein Consolidated Mines, Ltd.*[3] These decisions establish the following propositions. The test to determine whether a person is an alien enemy or not is not nationality, but the place of carrying on business. Such an alien enemy cannot sue in our Courts, but can be sued. His right to sue or proceed either by himself or by any person on his behalf in the King's Courts is suspended during the progress of hostilities and until after peace is restored. A company incorporated in England but with all its shares except one held by a German company and all its directors resident in Germany will be deemed to be an enemy company, though on this point there was a slight difference of opinion expressed by four of the learned Law Lords. In the case before us, however, there are no facts which justify us in holding that the Manasseh Film Co., having as its partners Thiruvengada Mudaliar and his undivided son, is an alien enemy. It is not an incorporated body. It consists only of these two persons as its proprietors. They are both resident here. They are British Indian subjects. From the fact that the company was originally formed at Singapore and continued to exist there till October, 1941, or even thereafter, we cannot conclude that it is still carrying on business at that place. Even if the plaintiffs were resident in Singapore on the date of the suit and the company was carrying on business at that place, it cannot be said that they are alien enemies, merely because Singapore has been subjected to military occupation by the enemy. So far as I am able to see, there is nothing in the Defence of India Act and the Rules made thereunder which compels us to hold that they are such enemies. The contract was made here with the defendant company which is here, the money is repayable here and the plaintiffs are residing here. By directing the return of the money which has to be returned because the venture or adventure has become frustrated by reason of the outbreak of hostilities and the contract has therefore become void, we are not authorising any trade with the enemy in the sense that any commercial, financial or other intercourse with the enemy is being encouraged or sanctioned. If there is nothing in section 83 of the Code and the Defence of India Act and the rules to prohibit the passing of a decree in plaintiff's favour, it is not strictly necessary for us to go elaborately into English decisions except it be for understanding the principles which should govern us in the decision of these cases though they may be of help in interpreting the language of the section or of the rules.

For the reasons given above, I am of the opinion that the plaintiffs cannot be regarded as alien enemies disentitled to sue for the return of the money that they had paid in respect of a contract that has become void and for which the consideration to move from the other party has entirely failed for reasons beyond the control of both the parties to the contract. Reference may be made in this connection to sections 56 and 65 of the Contract Act. A contract to do an act which, after the contract was made, has become impossible, becomes void when the act becomes impossible. When a contract becomes void, any person who has received any advan-

1. (1915) 1 K.B. 857.
2. (1916) 2 A.C. 307.
3. (1902) A.C. 484.

tage under such contract is bound to restore it or to make compensation for it to the person from whom he received it. The rule in *Chandler* v. *Webster*[1] is not the law under the Indian Contract Act. *Fibrosa Spolka Akcyjna* v. *Fairburn Lawson Combe Barbour, Ltd.*,[2] merely brings the English law into line with the Indian law.

There will be a decree in favour of the plaintiffs for the sum of Rs. 4,500 with interest at six per cent. per annum from the date of the plaint till the date of realisation.

Mr. Gopalaratnam said that, as the defence proceeded on the basis of *Chandler* v. *Webster*[1] and as the House of Lords' case reversing that decision appeared only after the written statement was filed, his clients should be excused the payment of costs. At first I was inclined to agree with him, but on going through sections 56 and 65 of the Contract Act, I find that there was little justification for the view that the rule in *Chandler* v. *Webster*[1] was the law in India. Costs, I am afraid, must follow the event.

He asked me to stay the execution of the decree till he preferred an appeal and got an order from the appellate Court. While I consider that this is perhaps a proper case for an appeal so that we may have an authoritative pronouncement of a Bench of this Court on the point of law raised by the defendants in bar to the maintainability of this suit, I do not think that any foundation has been laid for the grant of an immediate stay. I shall however make an order that no execution shall proceed without notice to the defendants.

K.C. *Suit decreed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Krishnaswami Chettiar and others .. *Appellants**

*v.*

Pappi Naicker and others .. *Respondents.*

*Irrigation rights—Wet lands included in the ayacut of Government irrigation tank—Portion of upper field remaining on a higher level and so not irrigated—Lower field irrigated from channel into which surplus water from upper field found its way—Owner of—Not entitled to prevent upper owner from levelling his field and irrigating whole of it—Remedy of lower owner is to apply to Government for regulating water supply—Extent of ayacutdars' right to supply of water.*

If an entire field is irrigable under a tank and a part of it situated on a higher level was not till lately irrigated by the water from the tank, that fact does not preclude the owner of the field from levelling the land in such a way as to irrigate the whole of the field from the tank. In such a case the fact that till such levelling the water irrigating a low portion of the upper land was after irrigating that portion of it finding its way into a channel which irrigated another field does not entitle the owner of that other field to insist upon the higher portion of the upper field being kept in the same state as before and to prevent the owner of the upper field from irrigating the whole of his field after levelling it, before letting out the water into the surplus channel.

The only remedy of the owner of the lower field is to approach the Government and to request that his lands also should receive an adequate supply of water. The Government has got the right of superintendence and the right of regulating the supply of water to all the wet fields included in the ayacut of any irrigation tank. The primary duty of regulating water supply to all the fields registered under the ayacut of a particular tank is on the proprietor or zamindar or the Government as the case may be. In the case of ryotwari areas the Government has got a primary duty of regulating the water supply and of indicating the source of supply. They may substitute one source for another and the holder of ryotwari lands has no right of complaint if instead of one source he is asked to take water from another source provided an adequate supply of water for his lands is ensured by the new source of supply. No doubt the Government will not be entitled to interfere with the old source of supply until a new and equally efficient source of supply is provided.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul dated 25th March, 1942 and passed in A. S. No. 104 of 1940 preferred against the decree of the Court of the District Munsiff, Periyakulam, dated 31st July, 1940 and passed in O. S. No. 158 of 1939.

*K. Rajah Aiyar* and *V. Seshadri* for Appellants.

*T. S. Venkatarama Aiyar* and *T. V. Ramanatha Aiyar* for Respondents.

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1. (1904) 1 K.B. 493.
2. (1942) 2 All.E.R. 122.

* S. A. No. 792 of 1942. 11th October, 1943.

The Court delivered the following

JUDGMENT.—Defendants 2 and 11 to 13 are the appellants in this appeal and there are various questions raised as to the rights of several ayacutdars holding wet lands under a tank—as to how the rights to take the water to the several fields are to be regulated.

The plaintiffs filed the suit for a declaration that they had the right of taking the water of the tank which is the source of irrigation to certain wet fields which bear S. Nos. 2757, 2759, 2760 and 1147. A plan was prepared by a Commissioner appointed by the Court which was marked as Ex. C and this plan will be referred to in my judgment. A reference to Ex. C shows that the fields owned by the plaintiffs are all to the east of a channel shown as the surplus channel. The appellants are the owners of S. No. 2765 which is situate to the west of this surplus channel. There are two tanks known as Karisalkulam tank or Pudu tank and Sengulam tank or Lakshminarayanapuram yeri. As regards the lands which are situate to the west of the surplus channel, the slope of the land is from south to north and from west to east. There is a channel shown with the letters L-M-P-O-N, N being the point of the junction of the channel with the surplus channel already mentioned. Plaintiffs' claim is that all the water which came on to the southern portion of 2765 was after irrigating that portion finding its way into the surplus channel and that sometime before 1917 the channel L-M-P-O which was till then existing was extended to the point N so that O-N also came into existence and that the water on the southern portion of 2765 used to find its way into O-N and discharge itself into the surplus channel. The plaintiffs claim that with the water flowing into the surplus channel, they were irrigating the fields which are mentioned already. The channel which took off the surplus water of the tank is the irrigation channel for the plaintiffs' fields. The right of the plaintiffs to take such water as is flowing into the surplus channel is not denied. The point of dispute between the parties is whether the plaintiffs are entitled to insist upon the defendants keeping O-N in the state in which it was for sometime before the disputes arose or whether the appellants through whose lands L-M-P-O-N passes are entitled to make certain alterations which they did in or about the year 1937 with the main object of leading the water which came on to the southern portion to the northern portion as well. The appellants say that the whole of the field 2765 is also registered as wet ayacut under the very same tanks Karisalkulam and Sengulam and that they are entitled to irrigate the whole of the field before letting off the water into the surplus channel. It is primarily the duty of the Government which levies wet rate from both the plaintiffs' and from the defendants' lands to regulate the water supply so as to ensure an adequate supply to both the lands. It is unfortunate that in this case in spite of an attempt made by the first plaintiff and others the Revenue authorities remained indifferent and that attitude has led to this litigation. Water flowing through the tank sluices is ordinarily intended to irrigate the lands classified as wet under a tank. There is no separate supply channel taking off from the sluices leading water to the plaintiffs' lands. The surplus channel is mainly designed to take off the surplus from the two tanks. Normally it is only when there are heavy rains that the tanks will have surplus and surplus water as such will get into this channel only then. It is obvious that if that water is all that the plaintiffs are entitled to take, their lands may not get an adequate supply of water. Plaintiffs say that the *mamool* or the practice obtaining in this village is what is known as field to field irrigation. Under this system each wet field is not provided with a separate irrigation channel. The tank water is led through a big channel taking off from a sluice and there are smaller channels leading off from the main channel taking the water to the various fields. Even these field channels as they are called do not reach every wet field and in several cases after irrigating one field, the tank water flows over the ridge of that field or by percolation or by a cut or vent in the ridge of the upper field into the lower field. Even in cases where there are no supply channels leading to every field, it is not invariably a cut or vent that is made. Particularly in cases where the wet fields are manured and that with artificial manures, it is obvious that if a vent or cut is made, all the essence will get on to the lower field

and very serious injury will be caused to the owner of the upper field. It is not therefore possible to lay down the rights of the owners of the upper fields and lower fields which will be of general application and Courts have to guard themselves against laying down any principle which might in other cases work very great hardship. It looks to me after having heard elaborate arguments from the learned advocates on either side, that the solution of such a question must depend upon the practice obtaining in each village or under each tank. Even in cases of two tanks in the same village the practice may differ according to the exigencies of the situation. The primary duty of regulating water supply to all the fields registered under the ayacut of a particular tank is on the proprietor or zamindar or the Government. In the case of ryotwari areas the Government has got a primary duty of regulating the water supply and of indicating the source of supply. They may substitute one source for another and a ryot holding ryotwari lands under the Government has no right of complaint if instead of one source he is asked to take water from another source provided an adequate supply of water for his lands is ensured by the new source of supply. No doubt the Government will not be entitled to interfere with the old source of supply until a new and equally efficient source of supply is provided. Various interesting questions have been argued at the Bar. Whether in a case where the tank water after coming through an irrigation channel spreads itself over a field which is irrigated by it and then flows over the field ridge on to another field or into an intermediate channel which in turn irrigates another field, the right of the lower owner in such a case is really a right to insist upon water from an artificial watersource being always ensured to him, whether it is surface water in the strict sense of the term that the owner of the lower field is claiming. If it is the one or the other difficult questions will arise because except in a very extraordinary case, the lower owner may not be entitled to insist upon the surplus being allowed to flow on to his field, though by continuous user for over the statutory period, the upper owner may acquire the right of discharging his surplus water on to the lower field. The right of the owner of the upper field to drain off his water into the lower field has nothing to do with the claim of the owner of the lower field to insist upon the surplus always being allowed to flow into his field. Cases which deal with the former may not be of use in dealing with the latter question.

That rights can be acquired in artificial water-courses is well settled. The Judicial Committee had to consider in *Rameshwar Pershad Narain Singh* v. *Koonj Behari Pattuk*[1], a case where after filling the tank of the defendants water used to flow out through an artificial channel and fill up a tank from which water was taken to the plaintiffs' lands. The defendants prevented this flow of water and diverted it by cutting an opening and otherwise bunding up the channel which took off the surplus water from the defendants' tank at a point between the defendants' tank and the tank irrigating the plaintiffs' lands. The defendants' tank was an artificial water-course. So also was the channel that led the water from the one tank to the other. The Judicial Committee laid down the law thus :

> "The right to water flowing to a man's land through an artificial water-course, constructed on a neighbour's land, must rest on some grant or arrangement, proved or presumed, from or with the owner of the land from which the water is artificially brought, or on some other legal origin. Such a right may be presumed from the time, manner, and circumstances under which the easement has been enjoyed."

On page 637 they said :

> " There is no doubt that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial water course constructed on his neighbour's land, do not rest on the same principle. In the former case, each successive riparian proprietor is, *prima facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands, from which the water is artificially brought, or on some other legal origin."

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1. (1878) L.R. 6 I.A. 33 : I.L.R. 4 Cal. 633 (P.C.).

If, for instance, there was a mill on the upper land and in the working of the mill water was let out and was received by the lower owner, the lower owner cannot acquire a right to insist on the water being let out to his fields even though the water was being so let out to his land for a very long time. But if as in the case before the Judicial Committee, the defendants' tank was of a permanent nature and the construction of the tank lower down and of the channels connecting the two and taking off water from the two to the respective fields all indicate a permanent and connected system of irrigation under the two tanks beneficial to both estates, the result would be that the owner of the lower tank would be entitled to insist upon the water being let down to it from the upper tank and a presumption of a lost grant can be made. To the same effect is the decision of this Court in *Rayappan* v. *Virabhadra*[1].

Then the mere fact that the water coming to the plaintiff's lands flows over the defendants' land over the whole surface does not conclude the question. It would depend upon the circumstances proved in each case whether even in such a case, the owner of the lower field would not be entitled to acquire a right by easement. The decisions in *Ramaswami Naicker* v. *Rasi Naicker*[2] and *Sheik Husain Sahib* v. *Subbayya*[3], deal with the rights of the upper owner to let off the water which he does not want on to the lower land. It is laid down that an owner of an upper agricultural land is entitled to let his water flow in its natural course without any obstruction by the owner of the lower land and that the owner of the lower land is not entitled to raise any bund on his land which will have the effect of seriously interfering with the upper owner's cultivation. In the latter case this rule was held to be applicable not only to lands situated in the country but also in towns and an earlier decision that for the towns a contrary rule prevails was overruled. The right of the owner of the upper field extends not merely to rain water which comes naturally on it but also to water which comes in carrying out agricultural operations; the owner of the lower field is bound to receive the water. In the former case it is termed a natural right and in the latter case a customary right—see *Kasia Pillai* v. *Kumaraswami Pillai*[4] where their Lordships say on page 431 :

> " In these circumstances, we have no doubt that the appellant is entitled by custom to discharge into the respondent's lands the water coming into his land for ordinary agricultural operations and he has a natural right to discharge the surplus rain water also into the plaintiff's lands. He can exercise this right by opening vents in his bund so long as no damage is caused to plaintiff."

To the same effect is the decision of Venkataramana Rao, J., in *Nagaratna Mudaliar* v. *Sami Pillai*[5], where the learned Judge points out that the right to let out the water brought on to his land for agricultural purposes may be viewed as one to be based upon the presumption of a lost grant and he also pointed out that if for a sufficiently long time water brought on to the upper land by artificial means for agricultural purposes is allowed to pass without interruption by the proprietor of the lower land into it, one can easily infer a custom and that the customary conditions of the locality require such user. The learned Judge also said that the doctrine of a lost grant can be invoked in aid of the inference of such a custom. There are very few decisions which deal with the converse case of the right of the owner of the lower field to insist upon water being let down to his land. The decision of the Judicial Committee in *Rameshwar Pershad Narain Singh* v. *Koonj Behari Pattuk*[6] and the decision in *Rayappan* v. *Virabhadra*[1] have already been referred to. They deal with cases where water was flowing in a well-defined course from the upper tank into the lower tank. The channel connecting the two was interfered with and the right of the owner of the lower tank was established as it was found that the tanks, the channels and the user all indicated more or less a permanent state of things and not temporary in character.

A number of English decisions were cited, but before referring to them it is necessary to bear in mind the essential difference between the conditions prevailing

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1. (1884) I.L.R. 7 Mad. 530.
2. (1913) 25 M.L.J. 276 : I.L.R. 38 Mad. 149.
3. (1925) 50 M.L.J. 377 : I.L.R. 49 Mad. 441 (F.B.).
4. (1928) 56 M.L.J. 311 : I.L.R. 52 Mad. 426 at 431.
5. (1934) I.L.R. 58 Mad. 979.
6. (1878) L.R. 6 I.A. 33 : I.L.R. 4 Cal. 633 (P.C.).

in England and those prevailing in this country. As pointed out in *Basavana Gowd* v. *Narayana Reddi*[1] by Wallace, J.:

"Although both sides have to a certain extent relied upon English cases, my considered view is that conditions in England are so different to those in the district of Bellary that I deprecate calling in aid English law on this subject and confess that I do not myself find it of any assistance here. In the first place, irrigation rights such as have been set out above to supply of water for irrigation from recognised Government sources are unknown in England, and such rights are therefore unknown to English law. Secondly, the running of a river current down its natural bed in the dry season a few inches below the sandy surface is a phenomenon unknown in England. The underground water to which the English cases apply is usually water between layers of subterranean rock or clay so hidden that no one can guess what their course is. In this country, it is fairly safe to say that the under current of a river is probably flowing down the river bed and that its course is defined in the sense that one will probably be able to tap it somewhere in the river bed, and the water thus is found in, and has not left, the recognised irrigation source, namely, the river. Finally, the English cases are usually contests between owners of the surface property under which the subterranean water originally was and the owner of the surface under which it was subsequently found and the crucial question was whether the ordinary rights of ownership extended to such water."

Krishnan Pandalai, J., says this on page 815:

"Finally, I share with my learned brother, doubts about applying the doctrine of percolating water flowing underground in undefined channels as settled by English decisions to the water carried in the sandy bed of an Indian river in the dry months between monsoon and monsoon. This feature of our rivers is due to the physical features of the country and other natural causes. The monsoons produce floods and torrents of a rapidity not known in Western Europe. The tropical heat produces rapid evaporation. But after the floods have subsided and the sands dried up in the scorching sun, the cunning river still saves up in her sandy mantle an ample store of life giving water which only requires the thin covering to be pushed aside to come to the relief of the thirsty villager and his crop. Some of these rivers have no flow at all in the dry weather. More frequently there is a straggling thin stream winding along the bed. Shall we say that all water under the river sand is percolating water flowing in undefined channels? Or shall we say that the river remains an underground 'stream' covered with a coating of sand—the flow being still continuous though slow and invisible,—a body of water still flowing within the defined channel of the river bed? The distinction between the two cases is not whether the water is found above or below the ground or whether the movement of water particles is or is not scientifically to be ascribed to percolation; but the distinction is whether the water can as a whole be reasonably spoken of as moving in one direction within a definite and known channel. Having regard to the description of a stream given by Lord Watson and Lord Halsbury in *M'Nab* v. *Robertson*[2], I respectfully submit that the question is not capable of a general answer applicable to all conditions to be found on the globe, and that the doctrine of percolating water being *publici juris* must be applied to Indian rivers with due regard to the reason of the rule—which is ultimately one of convenience."

On pages 818 and 819 the learned Judge pointed out the various points of departure of the Indian law from the English law on the law of waters. As pointed out by one learned Judge, water which is regarded as a common enemy in England is in India regarded as a common friend.

It is said that the water which is the subject of dispute in this case is surface water and that therefore no rights can be acquired in regard to such water. It is enough to refer to the decision in *Adinarayana* v. *Ramudu*[3] where this question is elaborately discussed and where it is pointed out that if water comes from a recognised course, flows in a defined channel, then spreads itself out over a field or over a particular area, and then after leaving the field irrigates another field direct or flows into a channel which in turn irrigates another field, it is not a case of surface water as is understood in English law in regard to which no rights could be obtained. On page 309 the reasons why no right can be obtained over surface water are dealt with. A quotation from the decision of Parke B., is set out to the following effect:—

"This is the case of common surface water rising out of springy or boggy ground, and flowing in no definite channel, although contributing to the supply of the plaintiff's mill. This water having no defined course, and its supply being merely casual, the defendant is entitled to get rid of it in any way he pleases."

The observation of Platt, B., in another case is to the following effect:—

"The plaintiff could not insist upon the defendant maintaining his fields as a mere water-table."

Lastly the judgment of Lord Hatherly, L.C., in *Grand Junction Canal Co.* v. *Shugor*[4] was referred to where the Lord Chancellor said this:

1. (1930) 61 M.L.J. 563 : I.L.R. 54 Mad. 793 at 802.
2. (1897) A.C. 129.
3. (1912) 24 M.L.J. 17: I.L.R. 37 Mad. 304.
4. (1871) L.R. 6 Ch.App. 483.

"Mr. Justice Wightman there laid down the law very plainly in giving the opinion of the Judges upon the subject, and the distinction was there drawn—and, I should have thought firmly established —between water which comes no one knows exactly whence, and flows no one knows exactly how, either underground or on the surface, unconfined in any channel, either as rainfall or from springs of the earth, which may vary from day to day, or sprung up from beneath the surface in a direction which no one knows—between that species of water and water once confined in a regular channel."

Then Sundara Ayyar and Sadasiva Ayyar, JJ., said this :

"His Lordship's description is quite inapplicable to water flowing into a field from a known channel and passing along the field, onwards into another field, though not over a confined tract in the former field but along its whole area. . . . . When the flow of water on one person's land can be identified with that on another, there is no reason why a right to such flow should not exist although the water may flow along an intervening piece of land. 'A mere right of a drainage over the general surface of land is very different from the right to the flow of a stream or brook across the premises of another' . . . . In each case, the question whether or not particular water is surface water is one of fact to be determined by the circumstances attending its origin and continued existence. If the water is spread out and flows sluggishly over the surface, losing itself by percolation and evaporation, it is surface water, although it has its source in springs. But the mere fact that the water spreads out at some places, and flows sluggishly without sufficient force to form a channel for itself, does not make it surface water if the flow has sufficient force to maintain itself, and it is subsequently gathered together into a channel so as to form a water-course. The chief characteristic of surface water is its inability to maintain its identity and existence as a water body . . . . . Well defined existence arising from an ascertained course appears to be the real test in coming to a conclusion against any body of water being regarded as merely surface water."

In the present claim it is no answer to say that the water spreads itself over the field of the defendant, that is, over a considerable portion of S. No. 2765. Nor can the rule of rights not being ordinarily acquirable in regard to water coming through an artificial water course, be applied, because the facts of this case are similar to the case of *Rameshwar Pershad Narain Singh* v. *Koonj Behari Pattuk*[1] and *Rayappan* v. *Virabhadra*[2]. Here is a system of irrigation ; tank channels take off from the tank and irrigate the lands of the plaintiffs. If all that the defendants can postulate is that the water claimed is from an artificial channel or that it spreads over the whole area or of a particular field, before it reaches the surplus channel which irrigates the plaintiffs' lands, the defendants would fail and the plaintiffs' suit would have to be decreed. But the point for decision in the present case is this : whether the defendants are entitled to irrigate the whole of 2765 which is a single field registered as the ayacut under this very tank before the water is allowed to go on to the surplus channel which directly irrigates the plaintiffs' lands. It is said that for several years the lower portion of 2765 which is to the south of M. N. O. P. was in such a state that water which irrigated that portion of the field flowed into the surplus channel and that that water was not taken to the northern portion of the field. What was done by the defendants in 1937 or thereabouts was to raise the level of the whole bed of the channel from M to N along its course M-P-O-N and introducing a undervent at the point 'O' to lead the water which was left after irrigating the lower portion of S. No. 2765 to the northern portion of 2765. Though India is mainly an agricultural country and cultivation of lands under tanks is a normal feature in several parts of it, even in the twentieth century we find that several portions of land irrigable under a tank are not completely brought under wet cultivation. Agricultural operations still go on reducing the level of one part of the land which till now has been in a higher level and levelling up the whole field so as to enable the water from the tank to reach the whole of the field. If an entire field is irrigable under a tank and a part of it situated in a higher level was not till now irrigated by the water from the tank, does that fact preclude the owner of that field from carrying on the agricultural operations and from levelling the land in such a way as to irrigate the whole of the field from the tank? In such a case if till such operations are carried on and the level reduced to a common level or something of the kind, water irrigating a low portion of his land was after irrigating that portion of it finding its way into another field or into a channel which irrigates another field, can the owner of the lower field insist upon the higher portion of the upper field being kept in the same state as before and to prevent the owner of the upper field from irrigating the whole of his field before letting out the water into

1. (1878) L.R. 6 I.A. 33 : I.L.R. 4 Cal. 633 (P.C.). 2. (1884) I.L.R. 7 Mad. 530.

the lower field or to the surplus channel. It is here that I find great difficulty and neither side has been able to help me with any authority which is of any help on this question. In 1886 it is clear that the channel O-N was not in existence. The channel L.M.P. stopped with ' O '. O-N must have come into existence subsequent to that date and before 1917 as it is found in the survey plan of 1917. But it is not possible to say when exactly it came into existence. O-N was interfered with by the defendants in between 1920 and 1923. There was litigation about it and after 1923 the channel has not been in existence for over twenty years before the date of suit. The suit was filed in 1939. Hence it is not possible to rest the plaintiffs' case upon any right by prescription. The way in which their right is put is that their fields 2757, 2759, 2760 and 1147 are all included in the ayacut of the tanks. The surplus water of the tanks is not ordinarily sufficient for the irrigation of his fields and for ever so long it is only the water that got into the surplus channel after irrigating the lands to the west of it that has been irrigating the plaintiffs' lands, and therefore the plaintiffs are entitled to a continuance of that state of things. Expressed thus in general language the proposition advanced by the learned advocate for the plaintiffs-respondents is not open to any serious objection. But the trouble comes in seeking to apply that rule to a case where the owners of the lands situate to the west of the surplus channel claim to irrigate the whole of the lands before the water is allowed to get into the surplus channel. They say that their land also is included in the ayacut and that therefore they are also entitled to irrigate the whole of their field with the water of the tank. For the appellants it is pointed out that except by some such arrangement as the one which they introduced in 1937, it is not possible to irrigate the northern portion of their land. The fact that it was not till now cultivated with the water coming on to the southern portion of the field, they say, is no answer to their right to take to the northern portion the water which comes on to the southern portion of the field. They are willing to concede that the mere fact that the water spreads over the whole surface of the southern portion is no answer to the plaintiffs' claim. But what is said is that the northern portion of the field is entitled to be irrigated by the tank water and that once the tank water comes to any portion of their field, they are entitled to take it to the whole of their field before letting it down into the surplus channel. On the other hand the respondents' advocate points out that along L-M-P there are branch channels going northwards into the northern portion of the field and that they are sufficient to irrigate the northern portion. But this is disputed. It is said that the appellants are not anxious to take the water to the northern portion unless it is necessary through a sub-vent at point ' O.' They say that the channels branching off L-M-P are not enough. The respondents rely upon the fact that till 1937 the northern portion was being irrigated either by the branch channels leading off from L-M-P-O or from the main channel flowing along the western side of 2771, 2775 and 2765 and marked with letter 2776 and that the appellants cannot claim to an increased water supply. But I am not inclined to agree with this view. It may be that there is a channel flowing along the western side of the northern portion of the field and that some portion of the northern field may be irrigated from the water flowing along the channel in 2776 and that some other portion also may be irrigated by the channels leading from L-M-P-O. But the question is whether these channels were irrigating the whole of the fields and for this question there is no answer. There are assertions on the one side and denials on the other. The plaintiffs assert that it is enough and the defendants say that it is not. It is unfortunate that the revenue authorities did not intervene though requested to do so. As pointed out by Krishnan Pandalai, J., in *Basavana Gowd* v. *Narayana Reddi*[1] it is the duty of the Government to supply enough water for irrigating all the lands which are registered as wet under a particular tank. Wallace J., says this on page 797 :

"The general law of this Presidency governing the right to water *as against Government of a ryotwari* wet land holder is well settled and admits of no doubt. *The ryot is entitled to be given such supply of water as is necessary and sufficient for the irrigation of his registered wet fields.* He must accept that supply from the irrigation source approved by Government as the source of supply for his fields, and he must

1. (1930) 61 M.L.J. 563 : I.L.R. 54 Mad. 793 at 797.

accept the method or machinery by which Government supplies that water. He has no right to insist that his supply shall come in any particular source or any other source than that recognised by Government or that it shall come by any particular channel, nor can he prescribe against Government for such right by user otherwise for any length of time. It is open to Government to alter at any time the manner and method by which it supplies the necessary water to him and he has no grievance or cause of action thereon. *It follows that between him and Government there is something in the nature of a contractual obligation under which Government undertakes to regulate, distribute and furnish to him his necessary supply in the manner authorised by it as the proper and usual manner until and unless Government has provided him with another, equally efficient* . . . . . . Government by undertaking the obligation to supply him with water also undertakes that it shall be at his disposal by the usual and customary method, that is by channel constructed either by Government or by the ryot or both, until and unless some other method is adopted . . . . In the view, I have taken that the sub-surface water of the river bed is the Government source of supply, it is clear that Government cannot shelve its duty of seeing to the equitable distribution of this supply, and that the Revenue Divisional Officer was not justified in his refusal to interfere, when the ryots of Malyam approached him with complaints of shortage of water."

Krishnan Pandalai, J., after laying down the right of a ryotwari proprietor in similar terms said this on page 810 :

"Whatever the legal character of the right, it is now settled that Government themselves cannot interfere with the accustomed mode of supply unless and until they substitute another and equally efficient mode, and if they do, will be legally liable to the injured ryot . . . . and that third parties like other ryots similarly interfering will be likewise liable . . . . The rights of ryotwari landholders to water for their holdings is an incident of ryotwari tenure whether it be regarded as having a contractual or proprietary origin. Whether ryots may by prescription or otherwise acquire a right against Government to more water or to take it in a particular way does not arise in this case. Therefore there is no question in this case of dominant and servient heritage essential to easements. Nor is the right of ryots to enjoyment of their rights of water undisturbed by other ryots an easement as against the holdings of those ryots. But it is the ordinary right of all who have rights to the undisturbed enjoyment of those rights, undisturbed by acts which the doers have no right to do. The plaintiff therefore was subjecting himself to an erroneous and gratuitous limitation when he founded his claim on prescription as apparently his advisers did in the lower Court, as the language of issue 1 shows. . . . . . . The Government being bound by law to furnish water to the appellants for their cultivation and to substitute another sufficient source of supply before interfering with the registered source customarily in use, which *ex hypothesi* is the water percolating into the Malyam channel, would be presumed to have bound themselves not to do anything to interfere with the existing source of supply till they had found the substitute."

Even taking all that the Subordinate Judge says to be correct and that the alterations complained of were brought about in or about the year 1937 and that for a long time prior to 1937, water was collecting in the lower part of the defendants' field 2765 and that after irrigating that portion was finding its way into the surplus channel, I am of opinion that the plaintiffs cannot insist upon that state of things continuing and that the only remedy of the plaintiffs is to approach the Government and to request that their lands also receive an adequate supply of water. If the Government which has got the right of superintendence and the right of regulating the supply of water to all the wet fields ensures an adequate supply of water to the defendants' land S. 2765 they might as part of the same arrangement direct the defendants to let out water through O-N or through some other channel for some days in the week or for some hours in the day as was suggested by the respondents' counsel. All this is for the Government but not for the Court. As things stand at present, this Court can only say that the defendants have a right of irrigating the whole of their land before being obliged to let out the water into the surplus channel.

In the result, the plaintiffs' suit will have to be dismissed holding as I do that the defendants-appellants are entitled to have the whole of their field irrigated before the water that comes on to their field is allowed to flow out subject of course to the undoubted right of the Government to regulate the water supply consistent with the rights of the parties as declared herein. Any rights which the fourth defendant may have under any contract which he might have made with the first defendant are of course not affected by anything said in this judgment. The appellants will have their costs in this Court from the plaintiffs-respondents. In the two lower Courts the parties will bear their own costs. No leave.

K.S. *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

RM. AR. AR. RM. AR. AR. Umayal Achi .. *Appellant** (*Plaintiff*)

*v.*

Lakshmi Achi and others .. *Respondents* (*Defendants*)

*Hindu Women's Rights to Property Act* (*XVIII of 1937*) *as amended by Act* (*XI of 1938*)—*Scope and applicability—Property obtained by a Hindu by survivorship—If "separate property"—Trust properties—Heritable right to—Rights under the Act—Property situate outside British India—How far governed by the Act.*

A Hindu testator (a sole surviving coparcener) possessing considerable assets in British India, Burma, Federated Malay States, Ceylon and French Cochin China died leaving two widows and a widowed daughter-in-law. The testator was also the trustee of numerous charities. By his will the testator nominated two executors and directed that his widows and daughter-in-law should each adopt a son, (only boys approved of by the executors were to be adopted). After directing the payment of certain legacies, the testator indicated that the trusts should devolve upon his heirs and after making other provisions gave *inter alia* the following directions :—

"As soon as each of the adopted sons becomes a major as stated above they shall also manage the properties along with the executors.

The matters relating to charity and trust shall be kept in common and managed and as soon as all the sons become majors, the estate and the properties relating to charity and trust should be handed over to them. The adopted sons shall co-operate with each other and maintain and manage the estate in common to the extent that it is possible for them to maintain and manage it in common. At the time when they wish that a division should be effected, they may do so."

The will contained no directions with regard to the disposal of the residue of his personal estate. No adoptions were made and the daughter-in-law filed a suit for the administration of the estate and partition of the assets among the heirs.

*Held*, (1) By virtue of the Hindu Women's Rights to Property Act, the widowed daughter-in-law is an heir to the separate property left by the deceased in British India, exclusive of agricultural lands.

(*ii*) The Act gives a widow and a predeceased son's widow a share in the estate of the deceased over which he had a disposing power and property which had come to the testator as the surviving member of a joint family did not cease to be his "separate property" within the meaning of the Act.

(*iii*) But the trust property can in so sense be regarded as the separate property of the testator. The trust properties held by him constituted heritable estates and the daughter-in-law cannot claim to be an heir to the trust properties under her personal law. The only heirs so far as the trust properties are concerned, are the testator's widows.

(*iv*) The Act does not apply to movable properties held by the testator in foreign countries because the *lex loci rei sitae* does not apply. Succession is governed by the law of domicile of the deceased. The daughter-in-law is not entitled to a share in the movable properties held abroad.

(*v*) As regards the immovable properties abroad succession will depend on the laws of the various foreign countries.

(*vi*) As the widows cannot be compelled to make adoptions however strong the directions given by the deceased might have been, the executors cannot retain possession of the trust properties which must devolve on his heirs, who are in the present case his widows. Though a female heir only takes a limited interest, she is entitled as of right to be placed in possession of her share without any security being demanded. Should it transpire that she is dissipating moneys which have come to her and thereby defeating the reversioners they can ask the Court to insist on security being furnished.

Appeal against the decree of the Court of the Subordinate Judge of Devakottah in O. S. No. 93 of 1938, etc., dated 26th October, 1940.

*R. Kesava Aiyangar, C. S. Rama Rao Sahib* and *S. R. Krishnamachari* for Appellant.

*T. R. Venkatarama Sastri, K.S. Sankara Aiyar* and *G.N. Chary* for first respondent; The Advocate-General (*Sir A. Krishnaswami Aiyar*), *N. Rajagopala Aiyangar* and *P. S. Raghavarama Sastri* for second respondent and *R. Gopalaswami Aiyangar* and *K. Vaidyanathan* for third and fourth respondents in appeal No. 321 of 1940.

The Judgment of the Court was delivered by

*The Chief Justice.*—These appeals and civil revision petitions arise out of proceedings instituted in the Court of the Subordinate Judge of Devakottah, with reference to the estate of one RM. AR. AR. RM. Arunachalam Chettiar, who

* Ap. Nos. 321 of 1940 3, 104 and 239 of 1941, and A. A. O. No. 282 of 1941 and C. R. P. Nos. 814 and 1493 of 1941. — 2nd September 1943.

died on the 23rd February, 1938. Appeals Nos. 321 of 1940, 3, 104 and 239 of 1941 are from a preliminary decree passed by the Subordinate Judge in a suit for the administration of the estate. The petitions ask for the revision of orders passed in the suit. C. M. A. No. 282 of 1941 is against an order granting probate of a will executed by Arunachalam on the 8th January, 1938. These matters have been heard together and can be dealt with conveniently in one judgment.

The testator, who was a member of the Nattukottai Chettiar community was a very wealthy man. His personal assets have been estimated to be worth Rs. 39,66,100. He had assets in British India, Burma, Federated Malay States, Ceylon and French Cochin China. In addition, he was the trustee of numerous charities, the endowments of which are said to aggregate in value Rs. 24,00,000. He married three times. By his first wife, who predeceased him, he had a son and three daughters. The son also predeceased him. The daughters are alive and have married. His second and third wives survived him. There was no issue of the second marriage and by the third wife he had a daughter, who died during the pendency of the administration suit. His son married Umayal Achi, the plaintiff in the administration suit. There was no issue of this marriage.

By his will the testator nominated as his executors AR. SM. A. Sundaresan Chettiar (a cousin) and CT. L. RM. Arunachalam Chettiar (a son-in-law). He directed that his widows should each adopt a son and that the plaintiff should do likewise. Only boys approved of by the executors were to be adopted. The testator directed that certain legacies should be paid. The legacies were substantial in amount but they absorbed comparatively little of the estate. He indicated that the trusts should devolve upon his heirs, and after making other provisions to which reference is not necessary he gave these directions :

> " As soon as each of the adopted sons becomes a major as stated above they shall also manage the properties along with the executors.
>
> The matters relating to charity, and trust shall be kept in common and managed and as soon as all the sons become majors, the estate and the properties relating to charity and trust should be handed over to them. They (the adopted sons) shall co-operate with each other and maintain and manage the estate in common to the extent that it is possible for them to maintain and manage it in common. At the time when they wish that a division should be effected, they may do so."

The will contains no directions with regard to the disposal of the residue of his personal estate. Neither of the widows has adopted a son, nor has his daughter-in-law.

On the 11th July, 1938, the daughter-in-law filed the suit for the administration of the estate and the partition of the assets among the heirs. The senior widow was made the first defendant, the junior widow the second defendant and the two executors the third and fourth defendants respectively. The plaintiff averred that the will was invalid because the testator was not in a sound state of mind when he signed it and that the executors had exercised undue influence on him. The third defendant was an undischarged insolvent and it was said that the fourth defendant was in indigent circumstances. She alleged that it would be disastrous to leave them in the management of the estate. She claimed that by virtue of the provisions of the Hindu Women's Rights to Property Act, 1937, she was entitled to a half share in the whole of her father-in-law's estate and the first and second defendants to the other half. In the event of the Court holding the will to be valid there was, she said, still an intestacy with regard to the bulk of the estate. Further she claimed that sums constituting her own *stridhanam* and that of her deceased mother-in-law to which she said she was also entitled had been deposited with the testator and asked that those monies should be paid over to her.

While supporting the plaintiff in her attack on the will and the management of the estate by the executors the first defendant averred that a fortnight before his death the deceased had orally authorised her to adopt a son to him ; that even if the will were valid the direction that the executors should approve of the boy to be adopted was merely advisory, not mandatory ; that the directions given to the junior widow and to the daughter-in-law to adopt sons were invalid, that the Hindu Women's Rights to Property Act, 1937 and the amending Act of 1938 (Act XI of

1938) were *ultra vires* the Indian Legislature; and that she, as the senior widow, was entitled to inherit the full estate and have the management of the trust properties. In her written statement the second defendant supported the will, but averred that in the event of the Court holding it to be invalid she and the first defendant were entitled to share the inheritance. She denied any right in the plaintiff for the same reason as the first defendant had advanced, namely, that the Hindu Women's Rights to Property Act, 1937, and the Amending Act of 1938 were *ultra vires* the Indian Legisalture. Inferentially she denied that there was any intestacy. The third and fourth defendants maintained that the testator was in a sound state of mind, when he executed the will and denied that they had exerted any undue influence. They averred that the will was valid and that it disposed of the whole of the testator's estate. They claimed that they were bound to administer the estate and accumulate the income for the benefit of the boys to be adopted in accordance with the directions given in the will. The pleadings contain other averments, but it is not necessary for the purpose of deciding the questions which arise in the appeals and petitions now under consideration to refer to them.

On the 12th July, 1938, the day after the institution of the administration suit, the plaintiff applied for the appointment of a receiver for the preservation and management of the estate until the disposal of the suit. This application was opposed by the executors, but it was granted by the Subordinate Judge in an order dated the 18th August, 1938. He appointed two receivers, both of whom were advocates practising in his Court.

On the 4th August, 1937, the executors applied for probate of the will. The grant was opposed by the plaintiff, the first defendant and two of the daughters of the testator by his first wife. The third daughter of the testator by his first wife is the wife of the fourth defendant. She supported the grant as did Alamelu Achi, a sister of the deceased. The application for probate was heard with the administration suit and was dealt with in a judgment dated the 26th October, 1940, when judgment was also delivered in the administration suit. In his judgment in the probate proceedings the Subordinate Judge held that the allegations that the testator was not of a sound disposing state of mind and that the executors had exerted undue influence on him had not been proved. C. M. A. No. 282 of 1941 was filed by the plaintiff with the object of obtaining the reversal of this decision. In this Court all the parties have, however, accepted the validity of the will, although they are not in agreement as to the effect of some of its provisions. As the will is now accepted C. M. A. No. 282 of 1941 will be dismissed and the appeals from the preliminary decree passed in the administration suit proceeded with on the basis that the will was executed by the testator when in a sound disposing state of mind and without being subjected to any undue influence.

The findings of the Subordinate Judge in the administration suit, so far as they are relevant to the appeals were (1) the testator had died intestate except with regard to the legacies; (*ii*) the residue of the estate devolved upon his heirs according to his personal law; (*iii*) the testator had no power to give directions with regard to the management of the trust properties, which also devolved upon his heirs; (*iv*) the Hindu Women's Rights to Property Act, 1937, was *intra vires* the Legislature; (*v*) by reason of that Act the plaintiff was an heir and was entitled to a half of the residue of the personal estate of the deceased; (*vi*) the testator's widows were entitled to the other half in equal shares; (*vii*) the Hindu Women's Rights to Property Act, 1937 did not make the plaintiff an heir so far as the trust properties were concerned; (*viii*) the testator's widows alone could claim the right to possession and management of the trust properties; (*ix*) the estate was of such magnitude that it would be dangerous to entrust the assets to the plaintiff and the first and second defendants without safeguards and it was desirable that the properties should be left in charge of an officer or officers of the Court until safeguards had been furnished; and (*x*) the receivers already appointed should continue to act pending the passing of the final decree.

Appeal No. 321 of 1940 has been filed by the plaintiff; Appeal No. 3 of 1941 by the first defendant; Appeal No. 104 of 1941 by the third and fourth defendants and

Appeal 239 of 1941 by the second defendant. The plaintiff says that the Subordinate Judge erred in not giving her a share in the management of the trust properties, that he erred in directing that the estate shall remain in the possession of an officer or officers of the Court until the heirs entitled to a partition of the assets have furnished safeguards and that he had omitted to deal with her claim to the *stridhanam* moneys deposited with the testator. In this Court the first and second defendants joined hands. They say that the Subordinate Judge's decision that the Hindu Women's Rights to Property Act, 1937 is *intra vires* is erroneous and that in any event the plaintiff is not entitled to a share in any of the properties left by the deceased outside British India. The complaint of the third and fourth defendants is that the Subordinate Judge did not leave them in the management of the trust properties. Mr. R. Gopalaswami Aiyangar, who appeared on their behalf, said that they had no objection to the personal estate of the testator being administered by the Court in the administration suit, but that his clients were interested in the proper management of the trusts and they claimed a right to be associated in the management.

It is quite clear that the testator died intestate with regard to the bulk of his estate. In fact the appeals have proceeded on that basis. At present the Court is not in a position to decide on whom devolve the immovable properties left by the deceased outside British India because succession here will, it is agreed, be determined by the *lex loci rei sitae* and there has been no inquiry into the law of succession in the various foreign countries. In these circumstances the parties desire that the trial Court shall in the course of the administration of the estate investigate this matter and in the final decree direct on whom the foreign immovables are to devolve. It has also been agreed that the plaintiff's claim to the moneys described by her as *stridhanam* shall be investigated by the trial Court in the course of the administration and likewise dealt with in the final decree. Further, it has been accepted that the Subordinate Judge erred in directing the estate to remain in the hands of an officer or officers of the Court until the heirs have provided safeguards against waste. The heirs of the testator are entitled to a division of his personal estate without furnishing such safeguards. A female heir only takes a limited interest, but she is entitled as of right to be placed in possession of her share. Should it transpire that she is dissipating moneys which have come to her and is thereby defeating the reversioner he can ask the Court to insist on security being furnished but such a position could only arise after partition. An unlawful alienation of immovable property does not affect the reversioner's rights. He is entitled to gain possession of it when the estate falls in. The same principles apply to the trust properties. Either the heirs or the executors are entitled to be placed in possession of them as soon as it is conveniently possible. Therefore the directions given by the Subordinate Judge in this connection must be set aside.

The questions which remain for decision in the appeals from the preliminary decree passed in the administration suit are these :

(1) Is the Hindu Women's Rights to Property Act, 1937, *intra vires* the Legislature ;

(2) If it is, what rights does it confer upon the plaintiff? and

(3) Who are entitled to possession and management of the trust properties ?

After the Subordinate Judge had delivered his judgment the Federal Court considered the validity of the Hindu Women's Rights to Property Act, 1937 on a reference[1] made to it by the Governor-General in Council, and held that its provisions are *intra vires* the Legislature except in so far as they affect agricultural lands in the Governors' Provinces. To that extent the Act is unlawful, and therefore persons who are constituted heirs by the Act are given no share in agricultural holdings left by a deceased Hindu in a Governor's Province.

Sub-section (1) of section 3 as it originally stood was in these words :

"When a Hindu governed by the Dayabagh School of Hindu Law dies intestate his property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property that separate property shall, subject to the provisions of sub-section (3),

1. *In the matter of the Hindu Women's Rights to Property Act, 1937*, (1941) 2 M.L.J. 12

devolve upon his widow along with his lineal descendants, if any, in like manner as it devolves upon a son;

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son;

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son."

Sub-section (3) states that any interest devolving on a Hindu widow under the provisions of the section shall be the limited interest known as a Hindu Woman's estate, provided, of course, that she shall have the same right of claiming partition as a male owner. By Act XI of 1938 the first paragraph of sub-section (1) was amended. When there is more than one widow, the widows together are now entitled, subject, to the provisions of sub-section (3) to the same share as a son. The amending Act also inserted a new section, section 5, which states that for the purposes of the Act a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

It is manifest that this Legislation has made the plaintiff an heir to the separate property left by the deceased in British India, exclusive of course, of the agricultural lands. It has, however, been contended on behalf of the first and second defendants that the personal estate left by the testator was not separate property within the meaning of the Act because the testator was joint with his father and what he died possessed of was property which had come to him as the surviving member of the joint family. It is said that the Act only applies to property which a person has acquired otherwise than by survivorship. We are not prepared to interpret the Act in this restricted sense. It was placed on the statute book in order to give a widow and a predeceased son's widow a share in the estate of the deceased over which he had a disposing power. In our opinion the insertion of section 5 puts this beyond doubt. The testator had full disposing power over all the properties of which he died possessed except with regard to the trust properties and Mr. T. R Venkatarama Sastriar who has appeared for the first defendant and whose arguments have been adopted, by Mr. N. Rajagopala Aiyangar on behalf of the second defendant, has conceded this. We hold that the personal estate of the testator constituted his separate property within the meaning of the Act.

With regard to the trust properties the position is different. In no sense can they be regarded as the separate property of the testator. In *Bhabatarini Debi* v. *Ashalata Debi*[1] the Privy Council held that *Sebaiti* is property, it is not a catena of successive life estates, but it is heritable—heritable property which in the first instance is vested in the founder. *Sebaiti* is trust property and the various trust properties held by the deceased constituted heritable estates because in respect of all of them succession to the trusteeships passed to his heirs. The plaintiff cannot claim to be an heir to the trust properties under her personal law. She can only come in if the statute allows her to do so and it does not. It only applies to property which belonged to a deceased person in his own right. The Subordinate Judge came to the correct decision when he held that the only heirs of the testator, so far as the trust properties are concerned, are the testator's widows.

It has now to be considered whether the Hindu Women's Rights to Property Act, 1937, gives the plaintiff a share in the movable properties which were held by the testator in foreign countries because here the *lex loci rei sitae* does not apply. Succession is governed by the law of domicile of the deceased. The first and second defendants contend that the Hindu Women's Rights to Property Act does not give the plaintiff a share in the movable properties held abroad, and we consider that the contention must be accepted. The presumption is that the Legislature deals *with matters only within its own jurisdiction.* This principle was fully discussed by Lord Esher M.R. in *Colquhoun* v. *Heddon.*[2] The respondent in that case had insured his life with the New York Life Insurance Company, which had been incorporated by a Special Act of the Legislature of the State of New York. He claimed to be

1. (1943) 2 M.L.J. 70 (P.C.). 2. (1890) 25 Q.B.D. 129.

entitled to deduct the amount of the premium in calculating his income liable for English Income-tax. The surveyor of taxes contended that the deduction was only allowable by the Income-tax Act then in force in respect of insurances effected with companies registered in the United Kingdom, and this contention was upheld. Lord Esher said :

> "What is the rule of construction which ought to be applied to such an enactment, standing alone? It seems to me that, unless Parliament expressly declares otherwise in which case, even if it should go beyond its rights as regards the comity of nations, the Courts of this country must obey the enactment, the proper construction to be put on general words used in an English Act of Parliament is, that Parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction and that we ought to assume that Parliament (unless it expressly declares otherwise) when it uses general words is only dealing with persons or things over which it has properly jurisdiction. It has been argued that that is so only when Parliament is regulating the person or thing which is mentioned in the general words. But it seems to me that our Parliament ought not to deal in any way, either by regulation or otherwise, directly or indirectly, with any foreign person or thing which is outside its jurisdiction, and, unless it does so in express terms so clear that their meaning is beyond doubt, the Courts ought always to construe general words as applying only to persons or things which will answer the description and which are also within the jurisdiction of Parliament."

In this case there is more than a presumption that in placing the Hindu Women's Rights to Property Act on the statute book the Indian Legislature intended to legislate only with regard to properties within its jurisdiction. Sub-section (2) of section 1, as it originally stood, stated that the Act extended to the whole of British India, including British Baluchistan and the Sonthal Parganas, but excluding Burma. The Act received the assent of the Governor-General on the 14th April, 1937; but when it was passed by the Legislature, Burma was a part of British India. The separation only took place on the 1st April, 1937. The very fact that Burma was excluded shows that the Legislature intended the Act to apply only to property within British India. The words "including British Baluchistan and the Sonthal Parganas but excluding Burma" were taken out of the sub-section by the Repealing and Amending Act of 1940 (Act XXXII of 1940). By this time it was not necessary to have a provision expressly excluding Burma because Burma was no longer a part of British India. There is here very strong indication that the Act was never intended to apply to any kind of property situate outside British India.

It follows that in our judgment the plaintiff is entitled to a half share of the personal estate of the deceased lying within British India, exclusive of agricultural lands, but that she is not entitled to any share in the movable properties outside British India. Whether she is entitled to any share in the immovable properties abroad will depend upon the result of the investigation to be held with regard to the laws of succession in the various foreign countries.

The last question relates to the rights to possession of the trust properties and this is the only question with which the executors are now concerned. They maintain that the will entitles them to remain in possession of the properties until an adopted son has attained the age of majority. We have already indicated that in no case had the testator the right to appoint his successor. Some of the trusts had been created by himself and others by his father, but in no instance was the holder of the office of trustee for the time being empowered to nominate his successor. In respect of some of the trusts the testator shared the duties of trustee with others. Three of the deeds of trust have been exhibited, and marked as Exs. III, IV and V. Ex. III is a declaration of trust signed by the testator on the 23rd November, 1924. He created himself the trustee for life and directed that his heirs and after their lives their heirs should be the trustees "hereditarily". Ex. IV is dated the 31st July 1926. It would appear to apply to trusts created before the testator's time. It states that :

> "for the proper conduct of the above charities we shall during our lifetime be the trustee and then, our heirs, and, after their lifetime their heirs shall be trustees, hereditarily and manage the same maintaining proper account therefor."

Ex. V is a deed of a similar nature and contains the same provision.

As in England the law in this country is that where a trustee is the sole or surviving trustee the estate descends to his personal representative unless the deed of

foundation otherwise provides. Therefore all the trusts of which the testator was the trustee devolved upon his personal representatives. The executors say that they are his personal representatives by reason of section 211 of the Indian Succession Act, 1925, and this is true, but this does not mean that they are entitled in law to retain possession of the trust properties. These properties devolve on the testator's heirs, who are here his widows and the duty of the executors, had receivers not been appointed, would have been to deliver them to the widows. The testator had no power to direct that the executors should remain in possession until such time as his directions with regard to adoption were fulfilled. In *Narayana Iyengar* v. *Vengu Ammal*[1], this Court held that a widow could not be compelled to follow her husband's wishes in the matter of adopting a son, however strong the directions of her husband might have been and she could not be deprived of her widow's interest in his property because she might at some later stage decide to follow his directions. In this case there has been no adoption and for the time being the testator's directions in that respect must be ignored, even if they are all valid as to which we express no opinion.

We will now deal with the two civil revision petitions. C. R. P. No. 814 of 1941 has been filed by the second defendant. The will provided for the payment of the sum of Rs. 75,000 to each of the testator's daughters. In the books of the deceased the sum of Rs. 1,004-1-0 stands to the credit of his deceased daughter by the second defendant, and the sum of Rs. 2,300 to the credit of the second defendant herself. The second defendant desired to file an additional written statement claiming that the Rs. 75,000, the Rs. 1,004-1-0 and the Rs. 2,300 should be paid over to her. The Subordinate Judge dismissed the application because he considered that it had been filed too late and the will itself was in dispute. All parties are now agreed that the second defendant should have been allowed to file the additional written statement and that the question whether she is entitled to these sums shall be decided in the further proceedings which must take place before the final decree is passed. This is a very proper attitude and the petition will be allowed.

C. R. P. No. 1493 of 1941 has been filed by the executors. The Subordinate Judge allowed them their costs in both the administration suit and in the probate proceedings and directed that the costs should be paid out of the estate. The executors applied for further time in which to file their bills of costs and time was granted. They filed them in time, but notwithstanding his earlier order, the Subordinate Judge refused to allow these costs in the preliminary decree. Again all parties are agreed that this was an error and that the executors shall be allowed such costs as are found due to them on taxation. There will be an order accordingly.

The preliminary decree passed by the Subordinate Judge will be amended in accordance with the directions given in this judgment and the administration of the estate by the Court will be continued on the lines indicated. The costs of all parties in the appeals and the civil revision petition both here and below will be paid out of the estate. There will be a certificate for two counsel where two counsel have appeared.

A certificate will issue under section 205 of the Government of India Act, 1935.

K.S. ——— *Preliminary decree amended.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE SOMAYYA

The Municipal Council, Bezwada, represented by its Chairman.. *Appellant**

*v.*

The Madras and Southern Mahratta Railway Company, Limited *Respondent.*

*Railways Act (IX of 1890) section 135 (2)—Scope—Officer appointed by Governor-General in Council in that behalf—Powers—Determination of fair and reasonable amount payable by railway administration to local authority in lieu of taxes—If can be made after assessment and payment of taxes—Amendment or cancellation of determination of reasonable amount payable for a period—Not permissible—Right of railway administration to claim refund of amounts paid as taxes—Madras District Municipalities Act (V of 1920), section 354 (2)—Not applicable.*

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1. (1938) 2 M.L.J. 613 : I.L.R. (1938) Mad. 621.

* Appeal No. 394 of 1941 and Memo. of Objections. 12th November, 1943.

Section 135 (2) of the Indian Railways Act gives authority, to the Officer appointed by the Governor-General in Council in that behalf, to determine and fix a sum which appears to him to be a fair and reasonable amount instead of the tax payable to the local authority by the railway administration under clause (1) of the section. The words "from time to time determine" in clause (2) of the section only gives the officer the power to change the sum which he or his predecessor might have fixed for a prior period, if the exigencies of the situation require that the amount should be varied for a subsequent period. But the words do not enable the officer concerned to vary the amount fixed by him for the period for which it was fixed. The power to vary or rescind conferred by section 21 of the General Clauses Act does not apply to the decision as to rights of parties made (as in this case) by the particular judicial or quasi-judicial or administrative authority.

The wording of section 135 (2) does not impose any condition that the order made by the officer shall apply only as regards the future. The wording is general and gives very wide powers to the officer expecting him to exercise them reasonably. It cannot be said that the officer cannot exercise such powers when action is invoked after the assessment and collection of the taxes by the local authority.

The liability to pay the taxes is put an end to by the determination of the reasonable amount by the officer under section 135 (2) and no tax must be deemed to have been payable for the period. Accordingly section 354 (2) of the Madras District Municipalities Act does not apply to bar a claim for refund of the excess amount paid by the railway administration as tax and a suit for recovery of such amount is maintainable as a suit for the refund of an amount levied as tax when in fact no tax was payable or leviable.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada in O. S. No. 50 of 1939.

*P. Satyanarayana Rao* and *S. Srinivasachari* for Appellant.

*C. Krishnaswami Aiyar* instructed by *King* and *Patridge* for Respondent.

The Judgment of the Court was delivered by

*Somayya, J.*—This appeal arises out of a suit filed by the respondent for recovery of a sum of Rs. 34,706-15-0 on the footing that the defendant-appellant collected by way of property tax a sum far in excess of what was legitimately payable by the respondent. The appellant is the Municipal Council, Bezwada, and the respondent is the Madras and Southern Mahrattah Railway Co., Ltd. Under the provisions of the Madras District Municipalities Act, the appellant-council levied a tax of Rs. 12,263-4-7 for each of the four half years of 1935-36, and 1936-37. The respondent paid the amount under protest and seeks to recover a major portion of the same on the ground that though the levy was otherwise proper, the District Collector of Kistna has fixed under section 135, clause (2) of the Indian Railways Act (hereinafter referred to as the Act) a sum of Rs. 7,173-1-8 as the amount payable for two half years. The amount involved in the suit and the appeal is the difference between the amount collected by the appellant and the amount fixed by the Collector as stated above. The suit was defended by the appellant on various grounds and the lower Court repelling all the defences gave a decree for the sum claimed. The defendant appeals and urges that the judgment of the lower Court is wrong.

It will be convenient at this stage to refer to the relevant provisions of the Act. Section 135 states that notwithstanding anything contained to the contrary in any enactment or in any agreement or award passed on any agreement, the rules laid down in the section shall regulate the levy of tax in respect of railways and railway administrations. Clause (1) provides that a railway administration shall not be liable to pay any tax in aid of the funds of any local authority unless the Governor-General in Council has by notification in the Official Gazette declared the railway administration to be liable to pay the tax. Then comes clause (2) which runs thus :

"While a notification of the Governor-General in Council is in force, the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or, in lieu thereof, such sum, if any, as an officer appointed in this behalf by the Governor-General in Council may, having regard to the circumstances of the case, from time to time, determine to be fair and reasonable."

By a notification dated 14th February, 1929 (Ex. C) the Governor-General in Council declared that the administration of the M. and S. M. Railway Company shall be liable to pay in aid of the funds of the local authority—the Municipal Council of Bezwada—the general property tax and drainage tax. An explanation was added to it that the expression,

"'General property tax' means so much of the property tax levied under section 81 of the Madras District Municipalities Act V of 1920, as comprises a tax for general purposes and "water

and drainage tax " means so much of the said property tax as is levied in accordance with clause (a) of sub-section (1) of the said section as a water and drainage tax."

It is under the provisions of this notification that the appellant-council levied the tax in question from the respondent. A valuation committee was appointed of which a nominee of the respondent-company was a member and in accordance with the recommendations of the valuation committee, the Chairman of the appellant council fixed the sum of Rs. 12,263-4-7, as the tax payable by the respondent for each half year. The tax levied for the two half years of 1935-36 was paid on the 1st February, 1936, the tax for the first half of the year 1936-37 was paid on 16th September, 1936, and that due for the second half-year of 1936-37 was paid on the 22nd December, 1936. All these payments were made under protest. In June, 1937, the respondent-company applied to the Collector of Kistna District who had been appointed as the officer concerned for the purpose of section 135 (2) of the Act and requested him to fix a fair and reasonable amount to be paid by it to the appellant. The District Collector heard the parties and made an order (Ex. K) on the 20th May, 1938, determining that a sum of Rs. 14,346-3-4 was a fair and reasonable sum to be paid for the two years 1935-36 and 1936-37. The appellant-company had collected for each half year a sum of Rs. 12,263-4-7. The respondent therefore made a demand of the appellant-council for a refund of Rs. 34,706-15-0 being the difference between the amount of tax collected and the sum which it had to pay as per order of the Collector under Ex. K. The appellant denied the claim and this suit is the result.

For the previous years there were disputes between the appellant and the respondent which turned mainly on the method of assessment followed by the appellant-municipality in fixing a particular sum as the tax payable by the respondent company. Those disputes culminated in O. S. No. 61 of 1935 on the file of the Court of the Subordinate Judge of Bezwada. Except for a small sum the claim of the respondent-company was negatived and the decision was upheld by this Court in A. S. No. 240 of 1937. An appeal has been filed to His Majesty in Council and the said appeal is pending.

In the present suit the questions that were mooted in the prior proceedings do not arise. The only question raised in this suit is about the effect of the order under section 135 (2) of the Act. The section is clear and gives authority to the officer appointed by the Governor-General in Council in that behalf to determine and fix a sum which appears to him to be a fair and reasonable amount instead of the tax payable to the local authority. When that is done, the railway administration will no longer be liable to pay to the local authority the tax mentioned in the notification under clause (1) . In this case the notification under clause (i) was that the respondent-company should pay to the appellant-municipality the general property tax and water and drainage tax. But for the action taken under section 135 clause (2) it is common ground that the railway company was liable to pay these taxes. The difficulty arises in this case on account of the fact that the railway company moved the District Collector to take action under section 135, clause (2) months after the last of the payments in question was made. The last of the payments made by the respondent company was, as already stated, on 22nd December, 1936. It was only in June 1937, that the respondent-company moved the Collector to take action under section 135 (2) of the Act. Ex. K was passed by the Collector of Kistna on the 20th May, 1938. On 21st September, 1938, the appellant-council pointed to the District Collector of Kistna (Ex. V) that after the collection by the Municipal Council of the amounts levied under the District Municipalities Act, no action could be taken in respect of those sums under section 135, clause (2). By this time the officer who had passed the order evidenced by Ex.K had left the station and one Mr. Karamatullah was the Collector in charge of the Kistna District. This officer passed proceedings evidenced by Ex. N on the 4th May, 1939, agreeing with the contention of the appellant-council that after the expiry of the quinquennium for which the valuation committee had made its recommendations and after payment of the tax by the railway company, the provisions of section 135 (2) of the Act cannot be invoked. The order of the 20th

May, 1938 (Ex. K) was therefore recalled. In this appeal two questions are raised (*i*) whether the order made on the 20th May, 1938, was validly cancelled by the subsequent order of the 4th May, 1939, and (*ii*) whether section 135 (2) can be invoked after the payment of the tax by the respondent-company.

For the position that an order under section 135 (2) may be varied subsequently the appellant's learned advocate relies upon the wording of the section and on section 21 of the General Clauses Act. First taking section 135 (2), it is said that the officer appointed by the Governor-General in Council to determine a fair and reasonable amount to be paid by a railway administration is expressly given power to change the figure from time to time. The wording of sub-section (2) which has already been set out, says that the railway administration shall be liable to pay such sum as an officer appointed by the Governor-General in Council may, having regard to all the circumstances of the case, from time to time determine to be fair and reasonable. We are unable to agree with the learned advocate for the appellant that the expression "from time to time determine" involves an authority to alter an order which has once been passed for a particular period. The wording relied on only gives the power to the officer to change the sum which he or his predecessor might have fixed for a prior period if the exigencies of the situation require that the amount should be varied for a subsequent period. There may be a rise or fall in the value of properties and there may be other circumstances as well which might render necessary an alteration in the sum fixed for a particular period. That we consider is the only result of the wording referred to and it does not, in our opinion, enable the officer concerned to vary the amount fixed by him for the period for which it was fixed. It is urged that if this is so, the Collector would not have the power even to rectify formal or clerical or arithmetical errors. But when the Collector merely corrects such an error he is only bringing the wording of the order in conformity with the real decision arrived at by him. But where it is not a formal defect or error that is sought to be rectified—in which case it might be said that the change brought out only the real meaning of the officer—and where the change involves an alteration in the substance of the decision itself, it appears to us that there is no power given to the Collector to effect such a change.

We will now deal with the argument based upon section 21 of the General Clauses Act. That section occurs in the group of sections which are headed "Provisions as to orders, rules, etc., made under enactments." Section 20 provides that:

"Where, by any Act of the Governor-General in Council or Regulation, a power to issue any order, notification, scheme, rule, form or by-law is conferred, then the expressions used in the order, notification, scheme, rule, form or by-law, if it is made after the commencement of the Act shall, unless there is anything repugnant in the subject or context, have the same respective meanings as in the Act or Regulation conferring the power."

Then comes section 21 which runs thus:

"Where, by any Act of the Governor-General in Council or Regulation, a power to issue notifications, orders, rules, or by-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any) to add, to amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

The appellant's argument is that the Indian Railways Act, 1890, conferred upon the officer mentioned in section 135, clause (2) a power to issue orders fixing a fair and reasonable sum as payable by a railway administration to a local authority, and that therefore a power to vary it is also expressly conferred by section 21 of the General Clauses Act.

Section 21 of the General Clauses Act does not, in our opinion, apply to this case. Under section 135 (2) of the Act, the Governor-General in Council appoints an officer and that officer is given by the Legislature power to determine, having regard to all the circumstances of the case, a sum which is reasonable and fair and this power may be exercised from time to time. The determination by the officer concerned of a fair and reasonable sum under section 135 clause (2) is not issuing an order under a legislative enactment. Section 21 applies to cases where under various enactments a power to issue notifications, orders or rules or by-laws is conferred. The section as it now stands is the result of an amendment by Act I of 1903. As it was originally enacted in 1897, section 21 ran thus:

" Where by any Act of the Governor-General in Council or regulation, a power to make orders, rules or by-laws is conferred, then that power includes a power exercisable in like manner and subject to the like sanction and conditions (if any) to add, to amend, vary or rescind any orders, rules or by-laws so made."

Under various enactments power was given to make rules, by-laws or orders. Before Act X of 1897 it was considered doubtful whether a power conferred by an enactment of the Governor-General or Regulation to make orders or rules or by-laws included a power to add, to amend, vary or rescind such orders, rules or by-laws. The matter was clarified by the enactment of section 21. Section 21 of Act X of 1897 corresponds to section 32 clause (3) of the Interpretation Act, 52 and 53, Vict. Ch. 63. That section runs thus :

" Where an Act passed after the commencement of the Act confers a power to make any rules, regulations, or by-laws, the power shall, unless the contrary intention appears, be construed as including a power, exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or by-laws."

As pointed out by Craies on Statute law (page 260, IV edition) :

" In Acts prior to 1890 which authorise the making of rules, regulations or by-laws, a power of rescission or variation must, it would seem, be given expressly or by necessary implication in order to authorise any alteration of the rules, etc., when once made, and without such power the rule making authority is *functus officio* on the first exercise of the power."

It is in order to remedy this state of things which necessitated a fresh enactment whenever a change in the rules or by-laws was felt necessary that section 32 clause (3) of the English Interpretation Act was enacted and section 32 clause (3) applies to cases where by an Act passed after 1889 a power is conferred to make rules, regulations or by-laws and it is only in such cases that the power to make rules, etc., includes the power to vary, rescind, revoke or amend the rules, regulations or by-laws. In India, prior to the enactment of 1897 a doubt was felt whether the power to make orders and rules included a power to vary or rescind those orders or rules. Sections 20 to 24 of the General Clauses Act relate to powers conferred upon, what we may call, a subordinate legislative authority. In several cases the Legislature instead of making orders and rules and notifications in the Act itself, enacts that a particular authority shall have, subject to the conditions mentioned in the enactment, the power to issue or make notifications, orders, or rules. In such cases the authority to which the power to issue or make orders or notifications is given is to have the power to modify, vary or rescind them. Some cases of delegated authority to issue orders and rules are set out in " Local rules and orders in the Madras Presidency," published from time to time. It does not apply to a decision as to the rights of parties made by the particular judicial or quasi-judicial or administrative authority. If section 21 is held to apply to all cases where an order is passed under an enactment, the result would be startling. A District Munsiff is authorised to pass several orders by the Code of Civil Procedure and if the interpretation urged by the appellant is accepted, then, the same Court or officer can vary or rescind them. This certainly is not the law. It has been ruled by the Judicial Committee that except as provided by the statute there is no power in a Court to modify or vary a judgment once passed by it. We therefore hold that the Collector of Kistna district had no power to modifiy or alter an order once passed by him under section 135 (2) of the Act. The order passed under Ex. N must therefore be held to be *ultra vires* of Mr. Karamatullah.

The next question is whether action under section 135, clause (2) of the Act can be taken after the collection by the local authority of the assessment levied by it. A two-fold argument is advanced. One is that the Act speaks of the power to be exercised by the Collector as regards the future . It is pointed out that no power is given to the Collector to fix a fair and reasonable sum where years and years have passed after the levy of assessment and the collection thereof. Mr. Satyanarayana Rao, the learned advocate for the appellant, urges that if it were otherwise, a Municipality which levies assessment and recovers and spends the amount for the general purposes of the Municipality, may, by action taken under section 135 (2), ten, twenty or thirty years later, be called upon to refund sums which had been collected and spent long before. The second argument is based upon the wording

of section 354, clause (2) of the District Municipalities Act. That section provides that:

> "No suit shall be brought in any Court to recover any sum of money collected under the authority of this Act or to recover damages on account of any assessment, or collection of money made under the said authority:
>
> Provided that the provisions of this Act have been, in effect, complied with."

It is urged that the respondent-company does not allege that the provisions of the District Municipalities Act have not been complied with and that therefore no suit can be brought in any Court to recover the sum collected under the authority of the District Municipalities Act.

As regards the wording of section 135, clause (2) of the Act, it does not impose any condition that the order made by the Collector shall apply only in respect of future. The wording is general and it seems difficult to escape the conclusion that the Legislature designedly gave the Collector very wide powers and expected the officer to exercise them, reasonably. If several years after the assessment and collections are made action is requested under section 135, clause (2), the Collector will, we have no doubt, decline to act under that section. But we cannot say that where, as in this case, action under section 135, clause (2) was invoked within a year after the first collection the power under that section cannot be exercised by the Collector. It is to be presumed that the Collector knew that he was asked to determine the sum payable for two years which had already expired and he was aware of the fact that the amount had already been collected. If nevertheless the District Collector proceeded to exercise the power given under section 135, clause (2) we must take it that he considered all the circumstances of the case and considered that this is a proper case for taking action under that section. As regards section 354, clause (2) of the District Municipalities Act, it has been held by this Court that where the person from whom a certain amount has been levied by way of profession tax or general tax under the Act is not at all liable to pay the tax, it is a case where the provisions of the Act have not been complied with. Seeking to tax a person who is not liable at all to pay the tax is held not to be covered by the provisions of section 354 (2) and such a person can file a suit to recover the amount collected from him notwithstanding the fact that all the formalities of the Act were duly complied with—see *Municipal Council, Cocanada v. Standard Life Assurance Co.*[1] and the *Municipal Council, Kumbakonam v. Messrs. Ralli Brothers*[2]. Section 135, clause (2) provides that the railway administration is to pay either the tax mentioned under the notification issued by the Governor-General in Council under section 135 (1) or in substitution therefor the sum fixed by the Collector as fair and reasonable. Once the Collector fixes a sum as a fair and reasonable amount to be paid by the railway administration the liability to pay the tax mentioned under the Governor-General's notification no longer exists. That liability altogether disappeared and a fresh liability takes its place and the fresh liability imposed upon the railway administration is not a tax collectable under the provisions of the District Municipalities Act but an amount which is collectable under the order of the District Collector made under section 135, clause (2). Under the notification of the Governor-General in Council (Ex. C) the railway administration was liable to pay a general property tax, water and drainage tax. This liability was put an end to in accordance with the directions under section 135, clause (2). Therefore, there was no tax payable by the railway administration either by way of a general property tax or water and drainage tax. That being so, the provisions of section 354 (2) of the District Municipalities Act do not apply and a suit lies for the refund of an amount which was levied as a tax, when in fact no tax was payable or leviable.

The appeal fails and it is dismissed with costs.

The respondent has filed a memorandum of objections as regards costs. The Subordinate Judge directed the parties to bear their own costs. In paragraph 21

1. (1900) 10 M.L.J. 401; I.L.R. 24 Mad. 205. 2. (1930) 61 M.L.J. 748 at 752.

of the judgment the Judge said that in the circumstances of the case and in view of Ex. N, he would direct the parties to bear their own costs. Having regard to the fact that the railway administration moved the Collector after the levy of assessment and after the collection of the tax and to the fact referred to by the Judge that a later Collector cancelled the order under Ex. K, we do not think that the Subordinate Judge erred in making the order that he passed as regards costs. It is a matter in the discretion of the lower Court and we cannot say that there is any error of principle in the order that he made. The memorandum of objections is also dismissed with costs.

K.S. ——— *Appeal and memorandum of objections dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VERE MOCKETT, *Officiating Chief Justice* AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

The Board of Commissioners for the Hindu Religious Endowments, Madras, by its President .. *Appellant**

*v.*

Palaniandi Muthirian and others .. *Respondents.*

*Madras Hindu Religious Endowments Act (II of 1927), sections 63 and 73—Hereditary trustees of excepted temple—Scheme providing for one trustee acting in rotation every year—Board has no power to frame.*

There does not appear to be any provision in the Madras Hindu Religious Endowments Act with regard to trustees in the case of excepted temples being suspended.

Where the Hindu Religious Endowments Board, on arriving at a finding that there was considerable mismanagement in the affairs of a group of temples, settled a scheme which provided *inter alia* that the temples and their endowments shall be administered by the hereditary trustees (who were four in number) in rotation, each functioning for one *fasli* in conjunction with two non-hereditary trustees appointed by the Board ; and a suit under section 63 (4) of the Act was brought by the hereditary trustees,

*Held*, that the effect of the provision was to exclude three of the hereditary trustees in each year from taking an active part in the management of the trust. Though under section 63 by its amendment by Act XII of 1935 so far as non-hereditary trustees are concerned, their number may be fixed and new trustees appointed by the Board there is no provision for the suspension or removal of hereditary trustees. The Board have a right to come to Court under section 73 for the removal of a trustee, but the section does not provide that they can pray for his suspension.

Accordingly the provision in the scheme, so far as hereditary trustees are concerned is in contravention of the Act and not within the powers of the Board.

Appeal against the decree of the District Court of Trichinopoly in O. S. No. 2 of 1941.

*P. V. Rajamannar* and *M. Chockalingam* for Appellant.

*A. V. Narayanaswami Aiyar* and *T. V. Ramanatha Aiyar* for Respondents.

The Court delivered the following

JUDGMENTS : *The Officiating Chief Justice.*—This is an appeal from the decision of the learned District Judge of Trichinopoly in a suit filed under section 63 (4) of the Madras Hindu Religious Endowments Act. The appellant is the Board of Commissioners under the Act by its president and the respondents are the four hereditary trustees of seven temples in Pallapuram, Lalgudi Taluk. A scheme has been settled by the Board after they have recorded their finding by an annexure to their order No. 1287-A, of the 4th March, 1940, to the effect, to put it shortly, that there was evidence of considerable mismanagement and chaos in the temples' affairs. The scheme contains 14 paragraphs and we are concerned with the second. It reads as follows :

" The temples . . . . and their endowments shall be administered by the hereditary trustees in rotation, each functioning for one fasli and two non-hereditary trustees appointed by the Board."

The effect of the scheme then was that the four hereditary trustees should in turn function once in four years in conjunction with two non-hereditary trustees appointed by the Board who were to be in that position permanently. The learned District Judge acceded to the contention of the plaintiffs, namely, that clause 2 of the scheme

* Appeal No. 313 of 1942. 17th September, 1943.

was beyond the powers of the Board. He held that the Board had no power to exclude any hereditary trustee even for a short period from taking an active part in the management of the trust. I agree with the learned District Judge's description of the effect of this clause, namely, that it did exclude three of the hereditary trustees in each year from taking an active part in the management of the trust. The question is whether under the law, statutory or otherwise, the Board had power to frame a scheme which contained such a clause.

Section 63 provides for the framing of schemes and (1) states that " a scheme settled by the Board under this sub-section may contain provision for (*a*) fixing the number of non-hereditary trustees; (*b*) appointing a new trustee or trustees in addition to the existing trustee or trustees; (*c*) associating one or more persons with the trustee or trustees or constituting a separate body, for the purpose of participating or assisting in the whole or any part of the administration of the endowment connected with such math or temple; provided that where the Board considers it necessary to associate any person or persons with the trustee or trustees of a math or to constitute any separate body for participating or assisting in the administration of a math such person or persons or the members of such body shall be chosen from persons having interest in such math"; (*d*) is not relevant, and (*e*) defines the powers and duties of the trustee or trustees.

Section 63 is contained in Chapter VI which deals with maths and excepted temples. I have already stated that the effect of clause 2 is to suspend three of the hereditary trustees in rotation for a period of three years. Is there any provision in the Act which enables the Board to do that in the case of an excepted temple? In the case of a non-excepted temple, section 53 gives the Committee power to suspend, remove or dismiss the trustees of a temple for certain specified reasons. There does not appear to be any provision in the Act with regard to trustees of excepted temples being suspended. Section 73 enables the Board to sue for a decree appointing or removing the trustee of an excepted temple, but nowhere is there any provision in the Act which directly provides for the suspension of a hereditary trustee. Mr. Subba Rao who appears for the Board which has appealed against the order of the learned District Judge has been unable to direct our attention to any such provision. He relies, however, instead on the decision of this Court in *Ramanathan Chetti v. Murugappa Chetti*[1], but the institution there concerned has been later described by the Judicial Committee in *Sethuramaswamier* v. *Meruswamier*[2] as a private charity. This is important because dealing with that class of charities at page 201 in *Ramanathan Chetti* v. *Murugappa Chetti*[1], the learned Judges of the Madras High Court stated:

" It could hardly be denied that the author of a trust who appoints several co-trustees might (as in *Attorney-General* v. *Holland*[3] already referred to) provide that each trustee in rotation should be the acting trustee for a year and that it would be competent for a Court in the exercise of its equitable jurisdiction to settle a scheme for the management of a public religious or charitable trust by the various co-trustees in rotation, if such management would be more beneficial to the interests of the trust than the joint and concurrent management thereof by a large number of co-trustees."

A reference to *Attorney-General* v. *Holland*[3] shows that a trust in regard to which a provision was made for the trustees to act in rotation was contained in a will. That decision when examined is of no assistance to us and it must be observed that the learned Judges in *Ramanathan Chetti* v. *Murugappa Chetti*[1] were dealing with the powers of the Court to be derived from the exercise of its equitable jurisdiction in connection with the broad topic of trusts. As already stated their Lordships of the Judicial Committee in *Sethuramaswamier* v. *Meruswamier*[2] expressly relegate the charity in *Ramanathan Chetti's case*[1] to the position of a private charity as to which they say:

" If there is no contrary provision in the original grant, the right of management passes to the natural heirs of the original grantee, and, if there be no other arrangement or usage and no scheme

1. (1904) 13 M.L.J. 341: I.L.R. 27 Mad. 192.
2. (1917) 34 M.L.J. 130: L.R. 45 I.A. 1: I.L.R. 41 Mad. 296 at 303 (P.C.).
3. 47 R.R. 476.

settled by the Court, will be exercised by the managing member of the family before partition or in turn by the several heirs after partition.

But their Lordships' attention has not been drawn to any case in which these decisions as to management have been applied to lands which constitute the endowment of such a charity as those in question in this suit."

The lands in question in this suit were lands the subject of a grant in connection with a math or public charity. I understand the observations of their Lordships as meaning that when there is no other control over the charity by means of an arrangement or usage or scheme, the Court may well have recourse to its general powers. In the case before us there is a statute which is expressly intended for the control of temples and generally for the provision of machinery for the purpose of that control. No other decisions have been cited to us which are in point. I am therefore constrained to examine the provisions of the Act itself to see whether any power is given to the Board by which they can suspend—because that is what it comes to—hereditary trustees in the manner in which they seek to do in the scheme before us.

It must be remembered that there are only four trustees. There might have been (as in other cases) many more, as many as eight to ten. Such a provision as this would virtually amount to the extinction of the rights of some of such hereditary trustees to function at all. I take the view that section 63 by its amendment in 1935 by Act XII of that year does, so far as non-hereditary trustees are concerned, define the Board's powers. The number of non-hereditary trustees may be fixed. New trustees may be appointed. But nowhere is there to be found in section 63 any provision for the suspension or removal of hereditary trustees. The Board have a right to come to Court under section 73 for the removal of a trustee, but it does not provide that they can pray for his suspension. The scheme therefore seems to be in contravention of the Act, so far as hereditary trustees are concerned. They continue to function unless they are removed by a suit. Taking the view, as I do, that the effect of this clause is to remove them for a definite period, I consider that the learned Judge quite rightly decided that it was not within the powers of the Board. It follows that this appeal should be dismissed with costs.

Mr. Subba Rao who has appeared for the Board, asks us not to send the matter back as that will merely lead to further litigation but here and now to direct that the four hereditary trustees should function in each year. That however, is entirely inconsistent with the agreement of the parties in the lower Court set out in paragraph 7 of the learned Judge's judgment. The parties appear to be quite in accord with the view that if this clause was held to be beyond the powers of the Board it was necessary that a new scheme would have to be framed.

*Krishnaswami Ayyangar, J.*—I agree.

K.S. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUNHI RAMAN.

Charlo Seshu Reddi .. *Appellant**

*v.*

Amperayani Subbarao and others .. *Respondents.*

*The Provincial Insolvency Act (V of 1920), sections 33, 37* and *38—Creditor not served with notice prior to approval of scheme of composition by Court—Name and debt however entered in the schedule and the majority of creditors consenting to the composition—Whether creditor can ask for re-opening of the proceedings.*

Where the statutory requirement regarding the majority of creditors who should consent to the composition has been fulfilled and the proposal for composition has been accepted and adjudication of insolvency annulled by the Court, a creditor who was absent at the time of approval of the scheme cannot ask for the re-opening of the proceedings and dealing with the matter afresh on the mere ground that he was not served with notice prior to the acceptance of the scheme by the Court. He must also satisfy the Court that had he been served with notice he would have been able to show that the terms of the proposal are not reasonable or not calculated to benefit the general body of creditors.

*Valliappa Chettiar* v. *Arandi*, (1942) 2 M.L.J. 470, distinguished.

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* A. A. A. O. No. 22 of 1942. 7th April, 1943.

Where after the approval of the scheme the name of the creditor and his debt have been entered in a schedule under section 33, he is precluded from asking for the re-opening of proceedings after the annulment of the adjudication in insolvency as the proceedings are binding on him under section 37.

Appeal against the order of the District Court of Nellore, dated 21st October, 1941, and made in I. A. No. 70 of 1941 in I. P. No. 50 of 1932.

*P. V. Rajamannar* and *K. Subba Rao* for Appellant.

*K. Umamaheswaram, C. A. Vaidyalingam* and *T. Venkatadri* for Respondents.

The Court delivered the following

JUDGMENT.—This case arises under the Provincial Insolvency Act. The second respondent is the appellant. He was adjudicated insolvent on the 30th August, 1933, in I. P. No. 50 of 1932 on the file of the District Court at Nellore. He then filed I. A. No. 326 of 1934 under section 38 of the Provincial Insolvency Act submitting a proposal for composition of his debts. The names of twenty-four creditors were given in this petition. The matter was notified in the papers and twenty-two creditors who were served with notice consented to the composition. The thirteenth creditor was declared *ex parte*. The third creditor opposed the application. Since the amount due to him was only Rs. 5,500 and the amount due to the remaining 23 creditors was Rs. 59,000, the statutory requirement about the majority of creditors who should consent to the composition was fulfilled and the proposal for composition submitted in the application was accepted by the Court. The adjudication was accordingly annulled on the 18th April, 1935. At the time that the scheme for composition was submitted, a doubt seems to have arisen as to whether the respondent to this appeal, who was the twenty-fifth creditor of the insolvent, had proved his debt or not. It appears from the records that it was brought to the notice of the Court that there was such a creditor and that the debt due to him was about Rs. 2,500. In view of the amount of the debt due to this creditor who was not impleaded as a party to the proceedings the Court seems to have felt that there was no necessity to inquire further into the matter and that the ends of justice and the requirements of law would be satisfied if provision was made in the composition arrangement for payment of dues to this additional creditor as well in case he came forward and proved his claim. It now transpires that prior to the acceptance of the scheme for composition, the respondent had proved his claim to the extent of Rs. 754-11-8. This was due to him under the decree in O. S. No. 623 of 1938 which was passed in a suit for possession of property together with mesne profits. In the decree there was provision for payment of future mesne profits and such future profits have since been ascertained. According to the petition filed in the Court below the total amount due to this creditor under the decree is Rs. 2,550.

After the composition scheme was approved by the Court and the total amount required for paying a dividend at six annas in the rupee, which was the arrangement in the composition deed, was deposited into Court, notice was served on the respondent by the special receiver appointed for carrying out the scheme on the 12th November, 1940, intimating that the amount that was payable to him under the arrangement was in Court deposit and that it was open to him to draw it out. It is the respondent's case that that was the first notice that he had of the composition arrangement having been accepted by the Court. He thereupon filed a petition under section 4 of the Provincial Insolvency Act in the Court below on the 21st January, 1941. It is from this petition that the present appeal arises. The main allegations in the petition were that prior to the acceptance of the scheme for composition the respondent here was not served with notice as required by law and that therefore he is not in any way bound by the composition scheme approved by the Court. He asked for a declaration to that effect so that it may be possible for him to execute the decree that he had obtained against the insolvent without being hampered by the composition scheme approved by the Court. The learned District Judge has granted this declaration holding that since the respondent to this appeal had received no notice of the proceedings under section 38 of the Provincial Insolvency Act, he was not bound by the composition scheme approved by the Court.

Mr. Subba Rao, the learned advocate for the appellant, urges three main contentions in this appeal. These are (*i*) since the proceedings in insolvency had terminated and the adjudication has been annulled by the lower Court, it was not open to the respondent here to have filed his petition under section 4 of the Provincial Insolvency Act; (*ii*) the respondent was an "aggrieved" person within the meaning of section 75 of the Provincial Insolvency Act if, as he says, he had no notice of the composition scheme which was approved by the lower Court and therefore the proper remedy open to him was to appeal under section 75 of the Provincial Insolvency Act and not to file an application under section 4. Since no such appeal had been filed within the time allowed by law, his application under section 4 was not competent; (*iii*) by merely proving that he was not served with notice prior to the approval of the scheme for composition the respondent did not become entitled to the relief that he asked for in his application in the lower Court. He ought to go further and make out a case under section 38 of the Provincial Insolvency Act.

I am not satisfied that the first and second contentions referred to above are well founded. Although the proceedings in insolvency might have terminated, the trend of decisions establishes clearly that the Insolvency Court retains control over the proceedings for certain limited purposes. If a creditor who has not been served with notice before a scheme for composition is approved by a Court is able to satisfy the Court that there are valid reasons for not approving this composition scheme I do not see any reason why the Court should not exercise jurisdiction to re-open the whole matter and dispose of the application for recognising the composition after considering the objections urged on behalf of the creditor who had no notice of the prior proceedings. There is nothing to show that the Court which dealt with the matter in the absence of such a creditor is not vested with jurisdiction to deal with his objections when properly presented.

This will dispose of the second argument addressed on behalf of the appellant as well. It may be possible for the creditor in the position of the respondent to appeal under section 75 but that cannot stand in the way of his asking for relief under section 4 of the Act when his object is to have the proceedings in the trial Court re-opened so that the matter may be disposed of after considering his objections.

The third contention urged on behalf of the appellant seems to me to be well founded. It is stated by the learned counsel on both sides that there is no direct authority which covers the point and that the case has to be decided in the light of the provisions of the Provincial Insolvency Act. The respondent's learned advocate wants to rely upon the decision reported in *Valliappa Chettiar* v. *Arandi*[1]. On the authority of that decision, he contends that according to the provisions of the Provincial Insolvency Act notice to every creditor is mandatory before a Court deals with a proposal for composition and that if such notice is not served then the whole proceedings must be regarded as void. The decision relied on did not arise under the Provincial Insolvency Act but under the Hindu Religious Endowments Act and it seems to me that the view taken in that case was based upon the provisions of that enactment and the circumstances of that particular case. Here the statute provides for what is usually referred to as a statutory majority of creditors whose consent would be sufficient to enable the Court to approve the composition scheme. Even if there are a few creditors strenuously resisting the application made on behalf of the debtor for composition, the existence of the majority would be sufficient to entitle the Court to act and accept the scheme. In the present case undoubtedly there was such a majority and it appears from the records that although the fact that there was an additional creditor like the respondent was brought to the notice of the Court before the composition scheme was accepted by it, the Court approved the scheme for composition without insisting upon notice being served upon the respondent as well; because apart from the claim of the respondent the requirements of the Act with regard to a majority happened to be fulfilled. Had the respondent been served with notice of the scheme submitted by the debtor and had he come and expressed his disapproval of the scheme his voice would not have prevailed.

1. (1942) 2 M.L.J. 470.

But had he gone further and had he been able to satisfy the Court that there were equities in the case which made it improper for the Court to accept the scheme put forward by the debtor, then the position might have been different. In the present case all that the respondent alleged and established was that he had no notice prior to the acceptance of the scheme by the Court. According to section 38, sub-section (4) if the Court is of opinion after considering any objection which may be made on behalf of any creditor that the terms of the proposal are not reasonable or not calculated to benefit the general body of creditors, the Court shall refuse to approve the proposal. No suggestion was made by or on behalf of the respondent in the present case that he had any objections that could be regarded as tenable within the meaning of clause (4) of section 38. It was certainly open to the respondent here to have satisfied the Court below that had he been served with notice he would have been able to come forward and urge objections of the kind referred to in the provision of law mentioned above and that because he was not served with notice, it was not possible for him to have done so. If that was the case made out by the respondent in the Court below it would in my judgment have been a sufficient ground to entitle the Court below to re-open the proceedings that had taken place in the absence of the respondent on the prior occasion when the composition scheme was approved and deal with the matter afresh. If there was fraudulent conduct on the part of the debtor and the respondent was prevented from putting forward his objections by the application being proceeded with without serving notice on him, there would have been sufficient justification for interference by the Court below and re-opening the whole proceedings. But in view of the provisions of the Provincial Insolvency Act according to which it is competent for the Insolvency Court to sanction the adoption of a composition scheme which is approved by the prescribed majority of creditors in spite of opposition from a minority, the respondent has not made out any case which would warrant the granting of the prayer in his petition.

Again, according to section 39 before it was amended in 1935 which contained the rule in force at the time when the matter was dealt with by the Court below, if the Court approve the proposal, the terms shall be embodied in an order of the Court and the Court shall frame a schedule in accordance with the provisions of section 33, the order of adjudication shall be annulled and the provisions of section 37 shall apply and the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any debts entered therein. In the present case the respondent's name was entered in the scheme and the provisions of this section seem to me to constitute another obstacle in the way of the respondent.

In these circumstances the appeal must be allowed with costs payable by the first respondent and the order made by the Court below must be set aside.

V.P.S. ——— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUNHI RAMAN.

Abdul Nabi Sahib .. *Appellant**

*v.*

Bajan Sahib and another .. *Respondents.*

*Specific Relief Act (I of 1877), section 42—Person being out of possession—Suit for bare injunction—Maintainability—Principal and agent—Termination of agency—Agent's possession—Whether enures for benefit of principal.*

A person who is not in legal possession of property is not competent to maintain a suit for a mere injunction against the party who is in possession.

Where the property is in the possession of an agent during the subsistence of the agency, it is not correct to say that the moment such agency is terminated, legal possession of the property must be deemed to pass back to the principal although the property continues to be in the enjoyment of the agent.

Appeal against the decree of the District Judge of Chittoor in A. S. No. 161 of 1940 preferred against the decree of the Court of the Subordinate Judge of Chittoor in O. S. No. 10 of 1940.

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* S. A. No. 412 of 1941. ... 3rd December, 1942.

*Rafiuddin Ahmed* for Appellant.

*Md. Askar Ali, Abdus Samad* and *Amir Ali* for Respondents.

The Court delivered the following

JUDGMENT.—An interesting question of law arises for decision in this second appeal. The first defendant is the appellant. The suit was for a permanent injunction restraining the defendant from interfering with the plaintiffs' peaceful possession and enjoyment of the suit properties and the performance of the religious services which are referred to in the plaint. It is conceded by the parties that the property which is the subject-matter of the litigation was originally granted by the Nawab of the Carnatic to one Nirgum Bi, the mother of the plaintiff Rosham Bi. The service to be performed by the inamdar was connected with the celebration of the Mohurrum every year. Nirgum Bi executed a document, Ex. I, on the 25th October, 1873. This is described as "Guardian and Dharmakartha Kararnama" and it was executed in favour of Nirgum Bi's son-in-law Dastagir. The recitals in this document are that Dastagir is the only senior male member connected with the family who can be relied upon to manage the properties because on the date of the document Roshan Bi and Budan Khan, the two other children of Nirgum Bi, were minors. The document conferred a right upon Dastagir to manage the properties and imposed the duty on him to discharge the religious functions annexed to the properties. This has been construed by the trial Court as a document by which Dastagir was appointed agent by Nirgum Bi, and the appellant's learned advocate, although he does not concede this position, does not think it necessary to question the finding for advancing the argument which he is addressing in second appeal. Dastagir was the father of the first defendant. The second defendant is impleaded as the son of the first defendant. The second daughter of Nirgum Bi is Roshan Bi the plaintiff. Pending suit she died and thereupon her son's widow Amina Bi and her son Bajan Sahib who is the grandson of Roshan Bi were brought on record as the legal representatives of the deceased first plaintiff and impleaded as the third and second plaintiffs respectively. The first defendant contested the suit. He denied the first plaintiff's claim and pleaded *inter alia* that the suit for injunction was not maintainable because possession was with him and not with the first plaintiff on the date of suit. According to him, his father Dastagir was the donee of the properties under Ex. I and on the death of Dastagir the ownership devolved on him being the only son of Dastagir. As an alternative plea, he alleged that he had acquired title by adverse possession. A third plea that was raised by him which is the only plea that is relevant for the purpose of this second appeal, was that the suit for a mere injunction was not maintainable, because on the date of suit possession of the property was with the first defendant and not with the first plaintiff. The appellant's learned advocate has confined his attention to this question of law in the first instance, though he has other contentions to urge.

The learned Subordinate Judge decreed the plaintiff's suit. According to the learned Judge, Ex. I was the document by which an agency was created and by which the first defendant's father Dastagir was appointed the agent of Nirgum Bi, his mother-in-law, for the purpose of managing the suit property. On the death of Nirgum Bi, the right of ownership that was vested in her devolved on her only surviving daughter Roshan Bi. On the death of Dastagir, the agency devolved upon the first defendant who continued to manage the property as the agent of the then owner Roshan Bi who was his maternal aunt. Although actual physical possession of the property was vested in the first defendant, yet because the first defendant happened to be the agent of Roshan Bi and he was enjoying possession in that capacity, legal possession must be presumed to be vested in Roshan Bi herself. In his judgment, the learned Subordinate Judge first considered the question of title and finds that title was vested in Roshan Bi, and then he says as follows :

"At the most the first defendant was only an agent. The possession of the agent must be treated as the possession of the principal. I therefore hold that the plaintiffs and defendants are not co-sharers, that the first plaintiff must be deemed to have been in possession on the date of the suit, that

after the death of the grandson the third plaintiff who is her only heir under the Mohammadan Law must be deemed to be continuing."

He goes on to say that in the circumstances, the possession of the defendants cannot be regarded as adverse possession. From this it is quite clear that he was of the view that actual possession was with the defendants. For the reason that constructive possession was vested in the plaintiffs, he found against the defendants on the first issue framed at the trial which was

"Whether the plaintiff's suit for a bare injunction without any relief for recovery of possession is maintainable."

On appeal, the learned District Judge confirmed this decision in a very brief judgment. The appellant's learned advocate wishes to contend that this judgment is not in accordance with law because the points for determination have not been formulated and dealt with by the lower appellate Court. But for the purpose of the contention actually pressed in second appeal, the judgment does contain sufficient material. The learned Judge held that :

"The learned Subordinate Judge's finding is correct that Roshan Bi, who filed this suit was in possession and she having died pending suit her grandson and her son's wife (2nd and 3rd plaintiffs) are now in possession."

It is thus clear that the learned Judge has in effect adopted the view taken by the trial Court, which, as already pointed out is that although actual physical possession was vested in the first defendant on the date of suit, yet, since he was having such possession in his capacity as agent of the first plaintiff Roshan Bi, legal possession must be presumed to be in Roshan Bi. Consequently the suit for a mere injunction without asking for possession was maintainable.

The main question for consideration is whether the view taken by the Courts below that Roshan Bi, the first plaintiff, had constructive possession through her agent the first defendant is correct. The learned Subordinate Judge states in his judgment that as the result of ill-feeling between the parties and by reason of prior litigation between the parties, namely, O. S. No. 52 of 1935 and A. S. No. 227 of 1936, Roshan Bi had revoked the agency of the first defendant. There is also no doubt whatever that if an agency was created as the result of the execution of Ex. I, the first defendant in any event had renounced that agency, because he was setting up title by adverse possession and he was refusing to surrender possession to Roshan Bi when she demanded possession. In such circumstances, there cannot be any doubt whatsoever that the agency was not subsisting on the date that the suit was filed. If the agency was not subsisting then the possession of the first defendant cannot be regarded as possession of Roshan Bi. The trial Court seems to have arrived at the conclusion that when the agency was terminated by the principal Roshan Bi, she must be regarded as having obtained possession in her own right. This is not a correct statement of the position. Where the property is in the possession of an agent during the subsistence of the agency, it is not correct to say that the moment such an agency is terminated, legal possession of the property must be deemed to pass back to the principal although the property continues to be in the enjoyment of the agent. The appellant's learned advocate wants to contend that even otherwise, for meeting the argument that a suit for a mere injunction cannot be maintained if the plaintiff has not got possession of the property, it would not be sufficient to show that the plaintiff has constructive possession, there must be actual possession. Expecially in a case where the dispute is between principal and agent, the theory of constructive possession cannot be relied on by the principal who is the plaintiff for the purpose of meeting a contention of this description raised on behalf of the defendant who is the agent. But it is not necessary to discuss this aspect of the question in view of the fact that the only possible conclusion that can be arrived at from the findings of the trial Court which have been adopted in their entirety by the lower appellate Court is that on the date of the suit, the first plaintiff, and consequently her legal representatives the second and third plaintiffs, could not have had legal possession of the suit property.

Starting from this position the appellant's learned advocate argues that if possession of the property was not with the plaintiffs on the date of suit, then since

the plaint contains merely a prayer for an injunction against the defendants the suit is not maintainable and is liable to be dismissed. In support of this argument he relies mainly upon the decision reported in *Ratnasabapathy Pillai* v. *Ramaswami Iyer*[1] which has been cited with approval in the recent Full Bench decision of the Court reported in *Kandaswami Thambiran* v. *Vagheesam Pillai*[2] and also in a Full Bench decision of the Lahore High Court reported in *Masjid Shahid Ganj* v. *Shiromani Gurdwara Parbandhak Committee*[3]. In the case in *Ratnasabapathi Pillai* v. *Ramaswami Iyer*[1] the learned Judges (Sankaran Nair and Krishnaswami Ayyar, JJ.) stated the position as follows :

" As regards the first position, assuming that section 42 of the Specific Relief Act is to be understood as not requiring the whole consequential relief to be claimed, we think a plaintiff out of possession is not entitled to ask for an injunction merely against the person in possession. This question has been fully discussed in the judgment of Subrahmania Ayyar, J., in *Vengan Poosari* v. *Patchamuthu*[4] though his actual decision in the case was not upheld on appeal on another ground. Upon a review of the English cases the learned Judge came to the conclusion that injunction is not the appropriate relief where the plaintiff is entitled to claim possession against the defendants. Kerr on Injunctions (4th edition) states at page 82, ' the result of the cases apart from the alteration made by the Judicature Act of 1873 was that where the plaintiff was out of possession the Court would refuse to interfere by granting an injunction unless there was fraud or collusion or unless the acts perpetrated or threatened were so injurious, as to tend to the destruction of the estate.' Again at page 114, ' if the trespass or damage is complete and the title is a pure legal title the Court would not in general interfere by way of mandatory injunction, there being a full remedy at law by ejectment.' The passages above cited are supported by a number of English cases some of which Mr. Justice Subrahmanya Aiyar has referred to in his judgment in *Vengan Poosari* v. *Patchamuthu*[4]. It is true that the language of section 25, sub-section (8) of the Judicature Act of 1873 is wider and allows an injunction whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise. But notwithstanding the generality of the language the principle laid down by Kindersley, Vice-Chancellor in *Lowndes* v. *Bettle*[5] and approved of by the Court of Appeal in *Stanford* v. *Hurlstone*[6] has been re-affirmed namely, that while defendant is in possession and the plaintiff seeks an injunction without possession, his claim will not be upheld. See *Leeds and Liverpool Navigation* v. *Horsefall*[7]. An injunction is a discretionary relief under section 52 of the Specific Relief Act and the considerations adverted by Mr. Justice Subrahmania Ayyar in the case in *Vengan Poosari* v. *Patchamuthu*[4] against the grant of such relief in this country where the plaintiff is entitled to ask for possession against the defendant are entitled to full weight."

The Full Bench decision in *Kandaswami Thambiran* v. *Vagheesam Pillai*[2] also refers to a much earlier decision reported in *Ramanuja* v. *Devanayaka*[8], where the learned Judges (Turner, C.J., and Muttuswami Ayyar, J.) observed :

" Possession, whether it is of property or of an office may be regarded as either a physical fact, or in contemplation of the legal right to it, and it is in the former sense it would be understood in coming to a finding under section 42 as to whether the plaintiff is, or is not, able to seek further relief."

This statement of the law supports the second contention urged on behalf of the appellant by his learned advocate that it is actual possession that matters in cases of this description where the question to be determined is whether the suit is not maintainable for the reason that the plaintiff has not asked for possession in addition to the subsidiary remedy of injunction. Applying this principle of law it is clear that on the facts of the present case since the plaintiffs or any one of them did not have possession of the subject-matter of the litigation the suit in which the only relief asked for was a permanent injunction was not maintainable. The first issue framed at the trial must therefore be answered in the negative. The result is that the second appeal must be allowed and the suit dismissed with costs of the appellant in all the Courts.

Leave refused.

B.V.V. *Appeal allowed.*

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1. (1910) 20 M.L.J. 301 : I.L.R. 33 Mad. 452.
2. (1941) 2 M.L.J. 463 : I.L.R. (1942) Mad. 13 (F.B.).
3. A.I.R. 1938 Lah. 369 (F.B.)
4. (1903) 14 M.L.J. 290.
5. (1864) 33 L.J. Ch. 451 at 454.
6. (1873) L.R. 9 Ch. 116.
7. 33 Sol. Jour. 183.
8. (1885) I.L.R. 8 Mad. 361.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING AND MR. JUSTICE SHAHABUDDIN.

N. Ramaratnam and others . . . . . . *Appellants**

*Criminal Procedure Code (V of 1898), section 40—Deputy Tahsildar empowered to record confessions—Transfer to 'foreign service'—Recalled to direct Government service as Tahsildar—Competency to record confessions without fresh notification empowering him once again in that behalf—Power to enhance sentences in revision—Guiding principle—Evidence Act (1872), section 10—Letter written subsequent to miscarriage of the common object of a conspiracy—Admissibility—Special Criminal Courts Ordinance (II of 1942), rule 23—Scope—If modifies the law as to the use of the confession of a co-accused.*

A Deputy Tahsildar empowered to record confessions was transferred to 'foreign service' as manager of an estate under the Court of Wards. On his retransfer to regular service as Tahsildar he recorded the confessions of the accused. On a contention that in the absence of a fresh notification empowering him once again as Tahsildar to record confessions, he had no such power and that the confessions recorded by him were therefore invalid,

*Held*, that the correct analysis of the situation is that the Government retaining some form of control over the officer's services, had recalled him to direct service under Government and had posted him as Tahsildar. His case therefore falls directly under section 40, Criminal Procedure Code and the powers granted to him as Deputy Tahsildar could lawfully be exercised by him as Tahsildar. The confessions recorded by him could not be invalidated on the ground of the absence of a fresh notification empowering him to record confessions.

Interference in revision with sentences is not justifiable except where a Judge has gravely erred in the exercise of his discretion or has obviously failed to appreciate the nature and gravity of the crime committed.

The common intention of the accused was to use a packet of explosive supplied by A1 to A2 to wreck or damage a bridge. That intention was carried out but owing to the failure of the fuse to act there was neither an explosion nor any damage to the bridge. A letter was written by A2 to A1 on the next day describing the unsuccessful attempt to damage the bridge and asking A2 if he could supply some further explosive substances. On a question whether this letter would be evidence against A1 under the provisions of section 10 of the Evidence Act,

*Held*, when once the common intention had been carried out, though unsuccessfully, it cannot be said that any common intention existed on the next day which would make the letter written on that day admissible as against A1.

The provision of the ordinary law that no conviction can be based solely on the confession of a co-accused is not annulled by rule 23 of the Special Criminal Courts Ordinance (II of 1942). Nor is it a correct interpretation of the rule to say that it permits the use as positive evidence of any statement made by any of the accused and recorded by a Magistrate. Though a confession is a statement it is a distinctive form of statement which has been separately treated under sections 24 to 30 of the Evidence Act. If the intention had been to override the provisions of these sections, the word 'confessions' would have been used in the Ordinance instead of the colourless word 'statement.' Although the expression 'notwithstanding anything contained in the Evidence Act' is very comprehensive, rule 23 is really intended not to modify the law as to confessions but to modify the law as to statements embodied in section 32 of the Act.

Appeals against the judgment of the Court of the Special Judge for the Presidency Town of Madras at Chingleput dated 11th May, 1943 and passed in Special Ordinance Case No. 1 of 1943, etc.

*T. R. Venkatarama Sastri, M. S. Venkatarama Aiyar, C. Narasimhachariar, K. Sankara Sastri* and *T. M. Kasturi* for Appellants.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Judgment of the Court was delivered by

*King, J.*—On the night of the 13th-14th January last an unsuccessful attempt was made to damage with gelignite the bridge carrying the South Indian Railway over the river Uppanar near Shiyali in the Tanjore district. Eight accused were tried in connection with this event under the provisions of Ordinance II of 1942 by the learned Special Judge for the Presidency Town of Madras at Chingleput. Of these accused, accused 3 was discharged and accused 4 and 5 acquitted. The remaining accused were convicted under various charges and have now appealed in exercise of the right of appeal granted by Ordinance XIX of 1943. Under the same Ordinance the learned Public Prosecutor has filed Criminal Revision Petition No. 459 praying for an enhancement of the sentences passed upon the appellants.

That the attempt was made is not disputed. It was discovered on 14th January, that a hole had been drilled into the central pier of the bridge at a point 2′ 4″ above

* Crl. App. Nos. 415 to 418 of 1943 and Crl. R. C. No. 459 of 1943. 16th November, 1943. (Crl. R. P. No 416 of 1943).

the water level and 10 ′ 9 ″ below the level of the rails, and into that hole had been inserted a packet of gelignite, a detonator and a safety fuse, running along the rib of an umbrella. Some pieces of cloth were attached to the outer end of the fuse, and they were found burnt but the fuse had failed to act, and therefore no explosion had occurred. The question to be determined is how far the various appellants have been proved to have been concerned with making that attempt.

The prosecution case, briefly put, is this. Accused 1 met accused 2 for the first time in accused's 2's house in Shiyali on 12th November, 1942, being introduced to him by accused 3 and 4, and agreed to supply him with a packet of gelignite. Accused 1 sent the packet to accused 2 on the 17th November, in the hands of accused 5. Shortly after receiving it accused 2, 6, 7 and 8 agreed together to use the gelignite to blow up the Uppanar bridge. The hole was made and the gelignite inserted on the evening of 13th January in the presence of all four accused. The cloth was set alight in the early hours of the morning on 14th January by accused 7 and 8.

The principal items in the prosecution evidence may be tabulated as follows :

(*i*) The confessions of accused 2, 6, 7 and 8 which were all recorded by P. W. 9, the Taluk Magistrate of Shiyali, on 24th January,

(*ii*) Entries in the diary of accused 2 under the dates 12th and 17th November. The first of these records the visit of accused 1, 3 and 4 to accused 2 on 12th November, the second of accused 5 on 17th November, and the receipt by accused 2 of ' a dynamite."

(*iii*) The direct evidence of P. W. 8 as to the visit of accused 1, 3 and 4.

(*iv*) The evidence of P. W. 11 as to the arrival at and departure from Shiyali Railway station of accused 5 on the 17th November.

(*v*) A letter Ex. J said to been written by accused 2 on 15th January, with reference to the unsuccessful attempt, and addressed to accused 1 in Madras. This was sent through the post and was seized by the Police when delivered at accused 1's business address on 18th January.

The appellants deny all connections with the offences. Accused 2, 6, 7 and 8 retracted their confessions at the trial and pleaded that they had been extorted from them by the Police through various forms of ill-treatment, threats and inducements and had been improperly recorded by P. W. 9, who both allowed police officers to be present at the time and added his own reassurances that no harm would come to the appellants. Accused 1 denied that he was ever acquainted with accused 2, and accused 2 supported this denial. Accused 2 pleaded that he was compelled during the police investigation to make the two entries in his diary, and denied that he wrote Ex. J.

Of these items of evidence the four confessions are the most important, and they have been first attacked in appeal on the ground that P. W. 9 was not empowered to record them. The facts relating to this contention are these. P. W. 9 was invested with this power on 5th June, 1941 when he was Deputy Tahsildar of Vedaranyam. From 7th September, 1941, to 4th September, 1942, P. W. 9 was in ' foreign service ' as Manager of Pappanad Estate under the Court of Wards. On 4th September, 1942 he was posted as Tahsildar of Shiyali. It is argued that as no fresh notification was issued empowering him once more as Tahsildar to record confessions, he had no such power, and the notification of 5th June, 1941, had effect only up till 7th September, 1941. In support of this argument our attention has been called to the ruling reported in *Kottithoti Mamed Haji*, In re[1].

The decision of this question clearly depends upon the interpretation of section 40 of the Criminal Procedure Code which in its present form runs as follows :

" Whenever any person holding an office in the service of Government who has been invested with any powers under this Code throughout any local area is appointed to an equal or higher office of the same nature, within a like local area under the same Provincial Government, he shall, unless the Provincial Local Government, otherwise directs, or has otherwise directed, exercise the same powers in the local area in which he is so appointed."

Now *Kottithoti Mamed Haji*[1], deals with facts which are clearly distinguishable, and is therefore not binding upon us. There the question simply was whether a person who had been a Magistrate in Government service but had retired, could

1. (1922) 44 M.L.J. 428.

be deemed to be a person acting as a Magistrate at the time when, after his retirement, he was appointed as a Special Magistrate under the Ordinance I of 1922. A negative answer to such a question seems obvious, and, if we may say so with respect, could well have been given without any reference to the practice of Government in re-conferring powers upon a Magistrate after a spell of work in the Secretariat. The question here at issue can be put very simply.

" Was P. W. 9 when he was appointed Tahsildar of Shiyali on the 4th September, 1942 a person holding an office in the service of Government."

It is argued for the appellants that he was not such a person since he was being paid not by Government, but by the Pappanad Estate. Rules 125 and 126 of the Fundamental Rules are called in aid in this connection. They speak of a Government servant reverting from foreign service and of the liability of the foreign administration to pay him ceasing on a particular day. Rules 120, 121 and 122, on the other hand, indicate clearly enough that, for certain important purposes, a Government servant in foreign service remains a Government servant. We cannot agree that in a matter of this kind the only question to be considered is the ownership of the fund from which the person concerned draws his salary month by month. And, even if that fact were considered of paramount importance, we feel that the correct analysis of the situation is that Government retaining some form of control over P. W. 9's services, had recalled him to direct service under Government and, then, having recalled him, had posted him to Shiyali. We are accordingly of opinion that P. W. 9's case falls directly under section 40 and that the powers granted to him as Deputy Tahsildar, Vedaranyam could lawfully be exercised by him as Tahsildar of Shiyali. The confessions which he has recorded are not therefore invalidated on this ground.

The reckless charges made by the appellants against the conduct of P. W. 9 in recording the confessions have not been sought to be supported in appeal, and, it almost goes without saying, are founded on no item whatever of the evidence given at the trial. There can be no doubt that P. W. 9 took proper steps to ascertain whether the confessions were voluntary, and that his certificate that they were so is an honest expression of his belief. The argument still remains however that in holding that belief P. W. 9 may have been deceived by the appellants who were careful under police instructions not to disclose what had really preceded their statements.

There is no positive evidence to support any case of ill-treatment, threats or inducement by the police. We are convinced, both from a study of the confessions themselves and from all the facts and circumstances of this case that the police investigation had been a fair and honest one. In particular we find ourselves in agreement with the learned Judge in holding that these four appellants in view of their educational qualifications are not men who are likely to have been influenced by any police threats or blandishments to confess to crimes which they never committed. We consider that, unless the contents of the confessions themselves prove that they cannot in essential particulars be true, the learned Judge was justified in accepting and relying upon them.

The main attack upon the confessions from this point of view is two-fold:

(*i*) They refer to the use of instruments in drilling the hole which could not have been used;

(*ii*)—this relating to the confessions of accused 2 and accused 6 only—they refer to the visit of accused 5 to Shiyali on 17th November, which has been proved to be false.

The first of these criticisms is not of much weight. P.W. 1 says that the hole was ' cleanly drilled ', and must have been drilled with ' a good instrument.' Accused 2 does not describe the instrument actually used, though he mentions the difficulty they experienced in procuring a proper instrument. Accused 7 and 8 speak of an ' iron rod ' having been used, after an ordinary " Rodger's knife " had been found useless. Accused 6 mentions only " a piece of wrought iron penknife " though it is uncertain whether he meant to say that the hole was actually made with that implement. It is argued that if these accused had really drilled the hole some

more specific and appropriate term would have been employed. There is, however, nothing to show that these accused were ordinarily familiar with the technical names for tools, and even P. W. 1, the Permanent Way Inspector himself who is able to *draw* the kind of tool necessary, calls it merely a "rod jumper". "Jumper" we are told, is merely a corruption of a colloquial tamil word. "Rod," it will be observed, is the very word the accused themselves use.

The second criticism is more important, for if accused 5 could not have visited Shiyali on 17th November, a date which is definitely fixed in this case by the entry in accused 2's diary—the suspicion is inevitably thrown upon the whole investigation. The learned Public Prosecutor concedes that accused 2 knew accused 5 well and therefore the reference in the diary could not have been the result of any mistake.

It was attempted first to be argued that because the learned Judge has acquitted accused 5 we are bound to hold, in favour of the appellants, that the evidence against accused 5, being rejected as insufficient to sustain his conviction, must in some way positively invalidate the evidence against them. *Emperor* v. *Sanalal Lallubhai*[1] was quoted in this connection, but it is obvious that that case deals with special facts and can have no application here. The question here is one not of law but of fact only. Did accused 5 bring gelignite to accused 2 at Shiyali or did he not? Three answers are possible. The first is "Yes" the second is "No" and the third is that the matter is doubtful. It is the third answer which the learned Judge gives. That necessarily involves the acquittal of accused 5, but it by no means compels us to hold that accused 5 did *not* in fact take the gelignite to Shiyali, and therefore, that any part of accused 2's and accused 6's confessions or the entry in accused 2's diary is false.

Accused 5 in January, 1943 was the Sub-editor of a paper called "Dinamani", one of a group of papers controlled by D. W. 12. The positive case for the accused 5 is that work in the offices of these papers which had been suspended since August when the papers ceased publication, began again from November 16, in expectation of the resumption of publication a few days later. On the 16th and 17th, conferences were being held in the newspaper's offices in Madras at which he attended. It was therefore impossible for him to gave gone to Shiyali on November 17.

Positive evidence of the presence of accused 5 at these conferences was given by D. Ws. 12 to 15, all men of standing connected with the newspapers. The learned Judge has not said definitely whether he accepted this evidence or not. We have been urged in appeal to accept it, but it is argued by the learned Public Prosecutor that whatever the standing of the witnesses, the strength of their evidence is not enough to falsify the entry in accused 2's diary. The two significant facts to which he points are (*i*) that in his very long and elaborate statement at the trial accused 5 made no reference to any "conference" though such important work at his office as the discussion of future policy at these conferences must have left a strong impression on his mind, and (*ii*) that no written record of the conference exists. In these circumstances we agree with the learned Public Prosecutor that it is likely enough that the witnesses may have exaggerated the importance of the work that was done on the 16th and 17th, and that they could not have remembered with reasonable certainty whether accused 5 was present at any conferences on the 17th or not. We are not prepared to accept this evidence as proving that accused 5 did *not* go to Shiyali on November 17.

The entry in accused 2's diary under date November 17 needs little separate discussion, except that we find it impossible to accept accused 2's plea that it is false and that he was compelled to make it, unless we are certain that accused 5 did not visit him. We accordingly agree with the learned Special Judge in accepting the four confessions as both voluntarily made and true. They clearly establish the guilt of accused 2, 6, 7 and 8. That of accused 2 is further corroborated in part by the evidence of P. W. 8, who speaks of the meeting between accused 1, 2, 3 and 4, on what must have been 12th November—evidence which we see no reason whatever to discredit—by the entries in accused 2's diary and by Ex. J. A pad from which

1. (1913) I.L.R. 37 Bom. 658.

the paper on which Ex. J was written may well have been detached was found in accused 2's house, and P. W. 17 the Government examiner of questioned documents has given evidence that the handwriting in Ex. J is that of accused 2. P. W. 17's evidence has been attacked, not in its details or on its own merits, but only on the technical ground that before giving his opinion he was made aware in full of the prosecution case regarding Ex. J. We see no reason to disbelieve him. There can be no reasonable doubt that Ex. J. though in part somewhat cryptically expressed does refer to the attempt to blow up the bridge and is good evidence against its writer. There is further as against all these four accused the fact that each of them implicates the other three in his own confession. This may be taken into consideration under section 30 of the Evidence Act, and in the absence of the slightest suggestion that any of them has any motive at all falsely to implicate any other of them it affords very valuable corroborative material. In these circumstances we consider that the convictions of accused 2, 6, 7 and 8 are amply justified on the evidence and we confirm them.

We now come to the case of accused 1. The positive evidence against him consists of P. W. 8's testimony about his visit to accused 2 on November 12, and, if admitted, of Ex. J, the letter addressed to him by accused 2. It must also be considered how far if at all, the references to him in accused 2's diary and confession can be used against him.

It may be mentioned at once that P. W. 8's evidence and the reference in the diary are in themselves of no value. P.W 8 does not profess to know what was the subject of any conversation between accused 1 and accused 2. The diary merely says that accused 1 "came." Apart from accused 2's confession the only positive part of the case against accused 1 lies in Ex. J.

Ex. J is a letter written on 15th January, and addressed to accused 1. It describes the unsuccessful attempt to damage the bridge, and asks accused 1 to say if he can supply "another pair of bullocks" which according to the prosecution case, which we accept, means some further explosive substances. The question we have to decide is whether this letter is evidence against accused 1 under the provisions of section 10 of the Evidence Act. It is argued for accused 1 that it is not, and reliance is placed for this contention upon a decision of the Privy Council reported in *Mirza Akbar* v. *King Emperor*[1]. That was a case of murder, and the Privy Council decided that a statement made before an Examining Magistrate by one of the murderers after the murder had been committed, implicating the other in a conspiracy to commit the murder, was no evidence against that other.

The learned Special Judge has refused to apply this decision to the facts of the present case on the ground of what appears at first sight a very important distinction and the learned Public Prosecutor supports his reasoning. It is pointed out that in the Privy Council case the murder had been committed, and therefore no common intention to commit it could remain once the intention had been successfully carried out. Here on the other hand, the intention to wreck a bridge or bridges with explosives had *not* been carried out, and therefore still remained the common intention of accused 1 and accused 2 on the 15th January. The learned advocate for accused 1 argues, however, that the distinction disappears on a closer scrutiny of the facts of this case, and we feel that this argument must be accepted. The vital factor is that accused 1 supplied accused 2 with only one packet of gelignite that is, with enough explosive to commit only one act of destruction, and it is very explicitly stated in accused 2's confession that when accused 1 and accused 2 met on 12th November, they agreed that accused 1 should supply accused 2 with just this one packet. The common intention, as this necessarily restricted, was to use this one packet for certain purposes, and that intention had been carried out on the 14th, and could no longer exist on the 15th. It may well be that if the failure on the 14th had been undetected, or if accused 1 had been in a position to reply to Ex. J he might have agreed to send more explosives to accused 2 in pursuance of their more general purpose of destructive action ; though it is equally possible that

1. (1940) 2 M.L.J. 811 : 1940 A.L.J. 778 (P.C.).

accused 1 would have had nothing further to do with such a bungler as accused 2 had proved himself to be. However, in view of the specific nature of the first charge, the specific reference to the first charge in the fifth charge, and the specific account which accused 2 gives of the agreement between himself and accused 1 it is we think impossible in this case to hold that any common intention existed on the 15th January which would make Ex. J admissible as against accused 1.

If Ex. J is excluded in considering the case against accused 1, as we now hold that it must be, the question arises whether the confessions of accused 2 can be used against him. Under the ordinary law there is no doubt that it cannot, for no conviction can be based solely on the confession of a co-accused. The learned Special Judge holds however that under rule 23 of the Ordinance this provision of the ordinary law is annulled. The rule runs as follows :

> "Notwithstanding anything contained in the Indian Evidence Act, 1872, when the statement of any person has been recorded by any Magistrate, such statement may be admitted in evidence in any trial before a Court constituted under this Ordinance if such person is dead or cannot be found or incapable of giving evidence."

His reasoning is that as the "confession" is undoubtedly a "statement," and as an accused person cannot give evidence in any trial in which he himself is accused rule 23 permits the use as positive evidence of any statement made by any of the accused and recorded by a Magistrate.

We are not prepared to hold that it is the correct interpretation of the rule. It is, of course, undeniable that a confession is a statement, but at the same time it is a very usual and distinctive form of statement which has required for its treatment the enactment of no less than seven sections of the Evidence Act (24 to 30). We think that if the Governor General had intended to override the provisions of these sections he would undoubtedly have used the word 'confession' in the Ordinance, and not confined himself to the colourless word 'statement.' Although the expression 'notwithstanding anything contained in the Evidence Act' is very comprehensive we feel sure that rule 23 was really intended not to modify the law as to confessions but to modify the law as to statements embodied in section 32.

We are thus as the result of our interpretation of section 10 of the Evidence Act and of rule 23 of the Ordinance, left without any evidence upon which the conviction of accused 1 can be sustained, and we must find him not guilty and acquit him.

There remains the question of the sentence imposed upon accused 2, 6, 7 and 8. They are five years' rigorous imprisonment and a fine of Rs. 1,000 upon accused 2, and three years' rigorous imprisonment for each of the other three. The learned advocates for the appellants question the jurisdiction of this Court to entertain any revision petition on this matter. We think the provisions of the Amending Ordinance XIX of 1943 are clear enough but need not discuss this matter further in view of what follows as we have decided on the merits not to interfere with the sentences. We do not think such interference is justifiable merely because one Judge's view of what is the correct sentence may differ from another's, but only if a Judge has gravely erred in the exercise of his discretion or has obviously failed to appreciate the nature and gravity of the crime committed. Here the learned Judge has not failed to give reasons for his sentences. There is we think no doubt that he is right in ranking accused 1 as more culpable than accused 2, and accused 2 as more culpable than accused 6 to 8. There are, too, indications in this case that none of these accused intended to cause loss of life and even perhaps that the material damage which the explosion might have caused would not have been very great. P. W. 1 no doubt says that the rails on the bridge would have "sunk and got displaced," but it is rather curious that this is not confirmed by P. W. 18, the Inspector of Explosives who merely speaks of "resulting damage to the surrounding structure." This is not, we think, a case of skilled criminals plotting with much technical knowledge to bring about far-reaching destruction. In all these circumstances we do not think any sufficient reasons exist for enhancing the sentences imposed upon those appellants whose appeals have failed.

We have finally to note two arguments on the question of jurisdiction. The first was that the Special Judge had no jurisdiction to try the accused because the

Police had originally filed a charge-sheet before the Stationary Sub-Magistrate or Sub-Divisional Magistrate, Mayavaram (it was not clearly ascertained which) in the expectation that the accused would be committed for trial. Such an argument seems obviously without foundation, and it was not for a moment asserted that the principle of section 403, Criminal Procedure Code was involved in it. The second was that the sentences passed, though purporting to be validated by Ordinance XIX of 1943, cannot be so validated because that Ordinance was *ultra vires* the Governor-General. This argument was not pressed before us as a Full Bench of this Court of which one of us was a member, has recently repelled it in *Subbarayan, In re*[1]—but requests were made that we should issue certificates to the unsuccessful appellants under section 205 of the Government of India Act. Certificates will be granted as requested.

V.S. *Convictions of accused 2, 6, 7 and 8 confirmed.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

J. D. Italia .. *Appellant**

*v.*

D. Cowasjee (died) and others .. *Respondents.*

*Partnership—Partner submitting tender in his own name on behalf of partnership formed for acquiring licences for carrying on retail business in toddy shops—Issue of licence only in the name of the partner and not to the firm —Partnership how far lawful—Suit for dissolution ond accounts—Maintainability—Contract Act, section 23 and Madras Abkari Act, section 15.*

When the Collector called for tenders in respect of toddy shops in Madras City, the plaintiff, a partner, submitted a tender on 23rd August, 1937, on behalf of the partnership but in his own name. The plaintiff had already informed the Secretary to the Board of Revenue of the partnership and the revenue authorities were fully aware of the arrangement at all material times. On 31st August, the tender was ultimately accepted. On 2nd September, formal notice of the partnership was given by the plaintiff in a letter addressed to the Commissioner of Excise adding that the shops would remain in the plaintiff's name. The defendant took exception to the issue of the licences to the plaintiff alone and consequently on the 11th September, the plaintiff wrote to the Collector asking that the licences for the shops should be issued in the joint names of plaintiff and defendant. On the 24th September, pending the decision on the question of the issue of the licences in the joint names, the Collector issued a temporary licence in the name of the plaintiff. On the 20th October, the plaintiff again wrote asking that the licences be issued in the joint names of himself and the defendant. It was not till the 10th March, 1938, that the Collector replied that the request could not be granted. As the plaintiff had made a full disclosure of the position before his tender was accepted he asked for a reconsideration of this decision. On the 11th April, the Collector wrote inquiring whether the plaintiff was prepared "to register a company Italia and Co. with himself and Mr. D. Cowasji as partners and with himself authorised to act in the name of the company. Although he used the word "company" the Collector was obviously inquiring whether the plaintiff was prepared to register the partnership under the Partnership Act. Ultimately after more correspondence on the 18th May 1938, the Collector wrote to the plaintiff informing that the licences would be issued in his name only. Thus up to the 18th May 1938 the revenue authorities were agreeable to the business being carried on in partnership and as the plaintiff was not able to comply with the suggestion to register the partnership the authorities decided that they will recognise only the plaintiff and issued the permanent licence in his favour.

In a suit for a declaration that the partnership was dissolved on the 30th September, 1938 and for accounts the defendant contended that as the licences stood in the name of the plaintiff alone the partnership was illegal and therefore the suit was not maintainable.

*Held*, that the partnership would have to be declared unlawful *ab initio* if a full disclosure of the position had not been made to the revenue authorities. But as until the 18th May, 1938, the revenue authorities had indicated no objection to the business being carried on in partnership, it cannot be said that the partnership before the 18th May, 1938, was an unlawful one. But after that date the partnership was unlawful. In the circumstances, the plaintiff was entitled to an account upto the 18th May, 1938 only.

Authorities discussed.

*Quaere* :—Partnership agreement anterior to bid in auction how far lawful?

On appeal from the judgment and decree of Krishnaswami Ayyangar, J., dated 3rd December, 1941, and passed in the exercise of the Ordinary Original Civil jurisdiction of this Court in O. S. No. 201 of 1939.

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1. (1943) 2 M.L.J. 247=I.L.R. (1943) Mad. 737 (F.B.)

* O. S. A. No. 18 of 1942. 23rd November 1943.

*V. Radhakrishnaiya, S. Govind Swaminathan, R. Purushothama Aiyangar* and *T. Aravamudhu Aiyangar* for Appellant.

*S. Srinivasaraghavan* for Respondents.

The Judgment of the Court was delivered by

*The Chief Justice.*—The appellant sued on the original side of this Court for a declaration that a partnership between him and the defendant was dissolved on the 30th September, 1938, and for an order directing that the accounts of the partnership be taken from the 1st October, 1937, to the 30th September, 1938. No oral evidence was given as the parties had agreed that the action should be tried on the correspondence and certain other documents. It is common ground that the partnership commenced before the 23rd August, 1937. The record does not disclose the exact date of the agreement, but this is not material. The partnership was formed for the purpose of acquiring licences for the carrying on of a retail business in toddy in shops in the City of Madras. Licenses were obtained, but they were only issued in the name of the plaintiff. The defence was that as the licences stood in the name of the plaintiff alone, the partnership was illegal and therefore the suit was not maintainable. This plea was accepted by Krishnaswami Ayyangar, J., who tried the action, and consequently he non-suited the plaintiff, who has appealed. During the pendency of the appeal the respondent died and his legal representatives have been made parties in his place. The situation disclosed is an unusual one and it is necessary to set out the course of events.

For the year commencing the 1st October, 1937, the Collector called for tenders in respect of toddy shops in Madras and on 23rd August, 1937, the plaintiff submitted a tender on behalf of the partnership, but in his own name. The plaintiff had already informed the Secretary to the Board of Revenue of the partnership and it may be taken that the Revenue authorities were fully aware of the arrangement at all material times. On the 28th August, 1937, the tender was withdrawn but two days later the letter of withdrawal was withdrawn. On the 31st August, the tender was accepted in respect of fourteen toddy shops, but subsequently two other shops were included. On the 2nd September, formal notice of the partnership was given by the plaintiff in a letter addressed to the Commissioner of Excise. The plaintiff added that the shops would remain in his name. The defendant took exception to the issue of the licences to the plaintiff alone and consequently on the 11th September, the plaintiff wrote to the Collector asking that the licences for the shops should be issued in the joint names of "J. D. Italia and D. Cowasjee" or in the name of "J. D. Italia and Co" whichever the Collector might think fit. On the 24th September, pending the decision on the question of the issue of the licences in the joint names, the Collector issued a temporary licence in the name of the plaintiff. On the 20th October, the plaintiff again wrote asking that the licences be issued in the joint names of himself and the defendant. It was not until the 10th March, 1938, that the Collector replied, and the reply was to the effect that the request could not be granted. As the plaintiff had made a full disclosure of the position before his tender was accepted, he naturally asked for the reconsideration of this decision. On the 11th April, the Collector wrote inquiring whether the plaintiff was prepared "to register a company Italia and Co., with himself and Mr. D. Cowasji as partners and with himself authorised to act in the name of the company." Although he used the word "company," the Collector was obviously inquiring whether the plaintiff was prepared to register the partnership under the Partnership Act. The plaintiff had to communicate with the defendant, who was resident in Bombay, and this occasioned delay. On the 30th April, the Collector called for a reply within one week and stated that otherwise the licences would be issued in the plaintiff's name only. The plaintiff asked for time to reply until the 1st June, but this was not granted. On the 18th May, the Collector wrote to the plaintiff informing him that the licences of the sixteen toddy shops would be issued in his name only and that he should produce security to the extent of Rs. 15,000 in the place of the Government Promissory notes belonging to the defendant which had been deposited

as part of the required security. At the outset each partner had furnished half of the security.

The defendant refused to comply with the suggestion of the Collector that the partnership should be registered and the plaintiff be authorised to represent the partnership. His reason for doing so is obvious. The business was being carried on at considerable loss and the defendant wished to avoid his agreement with the plaintiff, if he could possibly do so. The plaintiff objected to the requirements of the Collector that he should provide fresh security in the place of that furnished by the defendant, and a number of letters passed between the plaintiff and the Collector and the defendant and the Collector. In a letter dated the 4th August, 1938, the plaintiff wrote to the Collector objecting to the promissory notes for Rs. 15,000 which the defendant had deposited being handed over to him. In this letter the plaintiff said :

"The notes have been deposited by me under a covering letter signed by me, and I shall hold you responsible if the notes were handed over to anyone without my authority. You have accepted the partnership in the beginning and on your acceptance the notes were deposited. Mr. D. Cowasji is trying to get out of this, which in law is impossible."

The revenue authorities insisted on the plaintiff furnishing fresh security, which he eventually did. The defendant's Government Promissory Notes were returned to him by the Collector on the 31st March, 1939, six months after the expiry of the period for which the partnership was formed. It is common ground that the defendant controlled the management of the shops from the 1st February, 1938, until the 19th June, 1938, and that he was contributing his share of the funds required for the carrying on of the business till the 13th July, 1938. Altogether he contributed Rs. 1,37,422-10-7. Throughout the year only temporary licences were issued. These licences throughout stood in the name of the plaintiff and were renewed every fortnight. There can be no doubt that upto the 18th May, 1938, these temporary licences, although issued in the plaintiff's name alone, were intended to apply to the partnership. Upto that date the revenue authorities appeared to be agreeable to the business being carried on in partnership and it was only when the partners failed to follow the suggestion of the Collector that the partnership should be registered and the plaintiff authorised to represent it that they decided that they would only recognise the plaintiff.

Section 15 of the Madras Abkari Act prohibits the sale of intoxicating liquor without a licence, and section 55 states that whoever sells intoxicating liquor in contravention of the Act shall, on conviction before a Magistrate, be punished for each offence with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to six months, or with both. There is nothing in the Act or in the rules promulgated thereunder with regard to the sale of Abkari privileges to prevent a firm holding a licence. Rule 1 of the conditions with regard to sales by auction expressly recognises the acceptance of a bid on behalf of a company or firm. The rule prohibits a shop being knocked down in the names of two or more persons, but it provides that in the case of a recognised company or firm an agent duly authorised by a power of attorney, or any office-bearer empowered by the articles of association or similar rules, may bid for and act on behalf of the company or firm. Clause (*a*) of rule 27 states :—

"No privilege of supply or vend shall be sold, transferred or sub-rented without the Collector's or, in the case of a supplier under the contract distillery supply system, the Board's previous permission."

Clause (*b*) of this rule says that the transfer of a privilege will take effect from the date of issue of a licence to the transferee.

Section 23 of the Contract Act states that the consideration or object of an agreement is lawful, unless it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of a law, or is fraudulent, or involves or implies injury to the person or property of another ; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is unlawful and the agreement is void.

The rules laid down in *Bensley* v. *Bignold*[1] have bearing here. They are conveniently stated in Pollock's "Principles of Contract," 10th edition, at page 329 in these words :

"(*a*) When a transaction is forbidden, the grounds of the prohibition are immaterial. Courts of Justice cannot take note of any difference between *mala prohibita* (that is things which if not forbidden by positive law would not be immoral) and *mala in se* (that is things which are so forbidden as being immoral.)

(*b*) The imposition of a penalty by the legislature on any specific act or omission is *prima facie* equivalent to an express prohibition."

At page 331 of this authoritative work are these relevant statements of law :

"When conditions are prescribed by statute for the conduct of any particular business or profession and such conditions are not observed, agreements made in the course of such business or profession

are void if it appears by the context that the object of the legislature in imposing the condition was the maintainance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed ;

are valid if no specific penalty is attached to the specific transaction and if it appears that the condition was imposed for merely administrative purposes, e.g., the convenient collection of the revenue."

There are numerous decisions of this Court relating to partnerships entered into with regard to the exploitation of Abkari privileges and it will now be convenient to refer to those which have been most stressed in the course of the arguments. In *Marudamuthu Pillai* v *Rangaswami Moopanar*[2], the Court held that a partnership was unlawful in these circumstances. One of the partners held a licence for the sale of toddy while the other held a licence for the sale of arrack. They formed the partnership to carry on the business of selling both arrack and toddy. A rule had been framed under the Abkari Act prohibiting a person having a licence for the sale of toddy from being interested in the sale of arrack, or a person having a licence for the sale of arrack from being interested in the sale of toddy. The holder of the toddy licence sued for a decree for the dissolution of the partnership and for the recovery of money due to him from the partnership. The Court considered that the agreement was void *ab initio* on the ground that it was opposed to public policy. The rule prohibiting a person selling both arrack and toddy had not been framed merely for the protection of the revenue. It had also been framed for the regulation of the liquor traffic in the interests of the public. In *Thithi Pakrududasu* v. *Beemudu*[3], the plaintiff, who was the holder of a licence to sell arrack, sub-let his shop to the defendant without the Collector's permission. It was held that this agreement was unlawful and therefore the plaintiff could not sue upon it. In *Nalini Padmanabhan* v. *Sait Badrinath Sarda*[4], two persons, who held a licence for the sale of opium, without the sanction of the Collector admitted a third person as a partner. The third person brought a suit for the dissolution and winding up of the business. It was held that the suit did not lie, because the agreement was void. The Court considered that the agreement was illegal for the same reasons as those given in *Marudamuthu Pillai* v. *Rangaswami Moopanar*[2] and also because the admission of the plaintiff to the partnership amounted to a transfer to him of an interest in the licence, which was prohibited by law.

The decisions in *Marudamuthu Pillai* v. *Rangaswami Moopanar*[2] and *Nalani Padmanabhan* v. *Sait Badrinath Sarda*[4] were approved of in *Ramanayudu* v. *Seetharamayya*[5] which was decided by a Full Bench of this Court. In that case a successful bidder at an auction held for the sale of a toddy shop licence agreed with another to carry on the business in partnership. When this agreement was entered into, the licence had not been issued. The successful bidder executed a promissory note in favour of his partner in respect of money advanced by him for the carrying on of the business. The Collector's permission to this arrangement was not sought. The holder of the promissory note sued on it ; but it was held that as the partnership was illegal the suit did not lie. In all these cases the partnership had commenced after the bid had been accepted or after the licence had been issued.

1. (1882) 5 B and Ald. 335 : 24 R.R. 401.
2. (1901) I.L.R. 24 Mad. 401.
3. (1902) 13 M.L.J. 133: I.L.R. 26 Mad. 430.
4. (1911) 21 M.L.J. 425 : I.L.R. 35 Mad. 582.
5. (1934) 68 M.L.J. 570 : I.L.R. 58 Mad. 727 (F.B.).

After the decision of the Full Bench a case came before the Court where the partnership commenced before the auction—*Satyala Sanyasi* v. *Bhogavalli Sanyasi*[1] There five persons agreed to carry on business in partnership in respect of a toddy shop and the partners arranged that the plaintiff should bid on behalf of all and obtain a licence in his name, which he did. On the date of the partnership agreement one of the partners executed a promissory note in favour of the plaintiff for his share of the capital. The appeal was heard by Venkatasubba Rao, J., who distinguished the case from *Nalini Padmanabhan* v. *Sait Badrinath Sarda*[2] on the ground that the partnership had been formed before the auction and therefore there was no transfer of an interest in the licence. The wider question of public policy—the necessity of controlling all those who hold liquor licences in the interests of the public—was not discussed by Venkatasubba Rao, J. Where a partnership is entered into before the auction and one of the partners is deputed to bid for and obtain the licence in his own name on behalf of the partnership, it may be that in law there is no transfer of an interest in the licence, but it does not follow that the partnership would be a lawful one. There are other factors to be considered. The judgment of Venkatasubba Rao, J., was followed by Venkataramana Rao, J., in *Rangasami Pillai* v. *Narayanaswami Naicker*[3] but in *Rama Moopan* v. *Muthu Moopan*[4], Wadsworth, J., expresses strong dissent. He considered that the Full Bench decision covered even the case of a partnership agreement anterior to the bid.

There can be no doubt that on the decisions of this Court, the partnership between the plaintiff and the defendant would have to be declared unlawful *ab initio* if a full disclosure of the position had not been made to the Revenue authorities, but that is not the case. The partnership was entered into before the plaintiff submitted his first tender. The Revenue authorities had full knowledge of the situation from the very beginning, and until the 18th May, 1938, had indicated no objection to the business being carried on in partnership, although they had on the 10th March, 1938, said that the licences could not be issued in the joint names. They were, however, prepared to reconsider that decision, as the Collector's letter of the 11th April, 1938, shows. In these circumstances it cannot in our judgment be said that the partnership before the 18th May, 1938, was an unlawful one. But then there was a material change in the situation. The partners had failed to comply with the conditions which the Revenue authorities required to be fulfilled for the issue of permanent licences to the partnership and consequently they decided that they would not recognise the partnership at all. Nevertheless it continued to do business under the temporary licences issued to the plaintiff, but in doing so it offended against the principles which we have quoted from Pollock, principles which have received full recognition from this Court.

The plaintiff is entitled to an account upto the 18th May, 1938, but he refused an account on this basis in the trial Court and he has refused it in this Court. He has made it perfectly clear that he wants an account for the whole year or not at all, the reason being, of course, that an account upto the 18th May, 1938, will not help him. He cannot have an account until the end of the year, because the partnership was an unlawful one from the 18th May, 1938, and therefore his appeal fails. The respondent is entitled to his costs..

K.S. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE SOMAYYA.

Mohammad Abdul Sathar Baig and others .. *Appellants**

*v.*

Hafiza Bibi and others .. *Respondents.*

*Partnership—Interest of partners—Presumption as to equal rights—Absence of contract—Capital contributed equally, interest being however different—Death of one partner—Continuance of business by surviving partners—Rights in new business—Goodwill—Apportionment of rights between partners.*

1. (1935) 69 M.L.J. 490.
2. (1911) 21 M.L.J. 425: I.L.R. 35 Mad. 582.
3. (1935) 70 M.L.J. 691.
4. (1940) M.W.N. 516.

* Appeal No. 218 of 1940. 1st November, 1943.

Ordinarily in the absence of a definition of shares in a partnership business there may be a presumption that the shares of the partners therein are equal even though their capitals are unequal. But where a business has commenced with unequal shares, that circumstance is of material value in deciding the shares of the partners in the subsequent business carried on by them after the retirement of one of them. In the absence of evidence to the contrary the inference is that the shares of the retiring members have been taken by the continuing partners in the proportions in which the latter were originally interested in the concern.

And the circumstance that the money required for paying off the retiring partner was provided by the surviving partners not in equal shares but from the partnership funds which they held in unequal shares is an important circumstance to show that they take the same rights in the new business. The goodwill of a business is an asset like any other asset and the representatives of a deceased partner are entitled to a share therein. If action be taken in time the surviving partner can be restrained by an injunction from appropriating the goodwill or in any way rendering it less valuable. But where the surviving partner has for a long time appropriated all the advantages flowing therefrom the appropriate course will be to direct a valuation of the trademark and apportion the same among the persons entitled in the proportion in which they are interested in the business.

Lindley on Partnership 10th edition p. 424 and *Robley* v. *Brooke*, (1833) 7 Bligh (N.S.) 90 : 5 E.R. 705, relied on.

Lindley on Partnership, 10th edition p. 529 and *David and Mathews*, In re, (1899) 1 Ch. 378, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in O. S. No. 92 of 1934.

*K. Umamaheswaram* and *P. S. Raghavarama Sastri* for Appellants.

*V. Govindarajachari* for Respondents.

The Judgment of the Court was delivered by

*Krishnaswami Ayyangar, J.*—This is an appeal from the decree of the Subordinate Judge of Guntur in a suit instituted by the two sons and three daughters of a deceased Mohammadan, Yusuf Baig, for a partition and recovery of their shares in the estate left by him. Yusuf Baig died on 3rd December, 1927. The first defendant is his widow and she is the mother of the plaintiff. The second and the third defendants, Mohamed Ismail and Mohamed Gaffur, are his younger brothers. Defendants 4 and 5 are the wives of Mohammed Ismail.

The three brothers, Yusuf, Ismail and Gaffur were together carrying on a business in the manufacture and sale of beedies. From the profits of the business several immovable properties were purchased. They were treated as part of the assets of the business. On the 22nd January, 1925, Gaffur, the youngest of the brothers, left the business receiving for his share cash and property of the total value of Rs. 6,000. The arrangement come to by the partners at the time is evidenced by a deed of release, Ex. A, executed by Gaffur in favour of his brothers. It is said that there was a counter part of this release, but it has not been produced. This deed of release contains the statement that it was Yusuf who began the business and subsequently took his two brothers into it out of brotherly affection and for business purposes and it goes on to state,

" But as we (Ismail and Gaffur) requested Mohammed Yusuf Baig Sahib to give me and Mohamed Ismail Sahib some share in all those properties and in the business, he agreed to it out of affection and gratitude towards us and the following are the particulars of the shares which he and we got settled. It was settled that Mohamed Ismail Baig should have one share and that I (Gaffur) should have one share."

These recitals show that in the business so far carried on Yusuf was entitled to a half share and his two younger brothers were each entitled to an one-fourth share. The business was continued by Yusuf and Ismail and other properties were purchased from the profits earned. The death of Yusuf on 3rd December, 1927, brought about a dissolution of the partnership, but nonetheless, Ismail carried on the business but in his own name utilising the entire assets as they stood at the time of Yusuf's death. The partnership was not wound up and the share of Yusuf was not ascertained and paid to the heirs of the deceased. Before proceeding further it may also be mentioned that a trade mark known as the " Turkey Topee " distinguished the beedies manufactured by the partnership and was largely used on the beedies and the wrappers containing them.

Although the third defendant Gaffur is not among the legal heirs of the deceased Yusuf, his father and mother were and they were together entitled to an one-third share. By a deed of assignment dated 18th January, 1928, executed by his father

and mother, the third defendant Gaffur acquired their one-third share in the estate of the deceased. The second defendant Ismail claimed that he was entitled to a half share in the business carried on by him along with Yusuf since the date of the release deed referred to above. In the course of his evidence in the Court below, he stated that the shares mentioned in the deed of release were not correct but that they were so mentioned because Yusuf wanted to cut the third defendant out with a smaller share. In fact he stated :

> " Yusuf said that unless I pretended that I agreed to one-fourth share the third defendant would create troubles. So, I agreed. The third defendant took his share and separated."

His case really is that throughout, both before and after the deed of release, Yusuf and he had an equal share in the business and in the property acquired out of the profits earned. The plaintiffs and the third defendant contended that the shares of Yusuf and Ismail were in the proportion of 2 : 1 and this question formed the main point of contest between the parties. The learned Subordinate Judge has held that Yusuf was entitled to a half share while his two brothers were entitled to a one-fourth share each in the business which was carried on till the 22nd January, 1925, when the release deed came to be executed but that in the partnership assets and the business carried on from that date till the death of Yusuf, Yusuf and Ismail were entitled to a half share each. He rightly dismissed as worthless the oral evidence of defendants 2 and 3 on the points. They are the only persons who were in a position to speak to the shares. The shares mentioned in the deed of release had no doubt reference to the partnership that was carried on till the 22nd January, 1925, but the provision is undoubtedly a circumstance of great importance in deciding the shares in the business continued after that date. The learned Subordinate Judge however discounted the evidentiary value of this circumstance on the ground that the release was brought about mainly for the purpose of meeting the claim of the third respondent and not for the purpose of determining the shares between Yusuf and the second defendant and it cannot therefore be safely relied upon for the purpose of ascertaining the shares of the partners in the subesquent business. He appears to have been influenced by the fact that there was no conclusive evidence to show that the second defendant had expressly agreed to take a third share only in the properties and in the profits of the business and that being so, he must be held to have possessed an equal share with Yusuf. After giving our best consideration to the point we find ourselves unable to accept the conclusion of the learned Judge as correct.

As we have already indicated, the Subordinate Judge has refused to accept the evidence of the second defendant that he was entitled to a half share in the business from its very commencement. Indeed, there is every reason to think that it was Yusuf the eldest of the three brothers who was the founder of the business and who marketed the beedies manufactured by him under the trade mark " Turkey Topee." There is nothing in his claiming and being given a larger share, namely, a half as against a quarter of each of his two younger brothers. The explanation of the second defendant that the shares mentioned in the release deed were a mere pretext for reducing the share of the third defendant cannot be accepted as true. If then the shares of Yusuf and the second defendant were 2 : 1 in the old partnership, we find it difficult to accept the case of the second defendant that there was a change and that the shares in the subsequent business were to be equal. There is no special agreement proved between the partners regarding the alleged change of shares, nor is there any reason adduced for holding that there was any material change of circumstances leading to the inference that a change of shares was intended or agreed. The interest of Yusuf in the assets embarked in the business continued to be two as before as against the one of Ismail. There is no evidence again to suggest that Ismail had since acquired or employed any special skill in the manufacture of beedies, nor is he shown to have devoted any more labour than before. It is however contended that there is an overriding presumption that where a business is carried on by partners their shares are equal, even though their capitals are unequal. That may ordinarily be so in the absence of a definition of shares in a partnership business. But here we have a business

which admittedly commenced with unequal shares and this circumstance is in our opinion of material value in deciding the shares of the partners in the subsequent business carried on by them after the retirement of the third defendant. At page 424 in Lindley on partnership (10th edition) the following statement of law occurs :

"Moreover, if an agreement for inequality clearly at one time existed, no presumption of any alteration in this respect will arise from the mere fact that some of the original members have retired. In the absence of evidence to the contrary, the inference is that the shares of the retiring members have been taken by the continuing partners in the proportions in which these last were originally interested in the concern."

The learned author cites *Robley* v. *Brooke*[1] in support of the proposition. In that case there were two partners Robley and Anderdon in a partnerhsip brought into existence in 1802. The share of Robley was three-fourths and Anderdon's one-fourth. Robley had a sub-partner Brooke, who was to have a fourth share in the partnership, which was to come out of the three-fourths belonging to Robley. In other words, as between Robley and Brooke their shares were as 2 : 1. It was a term of the partnership that in case of the death of Anderdon his share should be divided so as to give Robley two-thirds and Brooke one-third of the whole business. In March, 1804, Anderdon retired from the partnership and there was in consequence a dissolution of the firm. Anderdon was paid out of the moneys in the business two sums of £2,668-12-5 and £2,500, and it was agreed that all the property of the partnership should belong absolutely to Robley and Brooke. There was no specification then made as to the proportion in which they were to hold their shares or interest in the partnership assets. On the death of Robley in 1821 disputes arose between the representatives of Robley on the one hand and Brooke on the other on two points, namely (1) their shares in the partnership, and (2) their shares in a mortgage security acquired in June 1804. Their disputes were brought before the Court of Chancery in a bill filed by Brooke and a crosss bill by the representatives of Robley. The Vice-Chancellor (Shadwell) who tried both the causes held that the purchase of the mortgage security was a separate venture of the individual partners independent of the partnership, that they were interested in and entitled to it in equal shares, but as regards the shares of the partners, he decided that Robley was entitled to five-eighths and Brooke to three-eighths on the footing that the one-fourth share of Anderdon must be deemed to have been purchased in equal shares by the two partners notwithstanding that their shares were in proportion of 2 : 1. An appeal was preferred by the representatives of Robley and it was heard by the Lord Chancellor Brougham and Lord Plunket who delivered separate but concurring judgments holding in reversal of the Vice-Chancellor's decision (1) that the acquisition of the mortgage security was a partnership transaction and not an independent venture ; and (2) that the shares of the partners Robley and Brooke were 2 : 1 in the business carried on after the retirement of Anderdon as before. The decision on the latter point which is the only one material for the present purpose is contained in the following observations of the Lord Chancellor :

"First, the whole profit and loss account is to be divided among the three partners ; two shares to Mr. Robley, one share to Mr. Brooke. That was prior to Mr. Anderdon's leaving the firm. Now, looking at the transactions as they pass, who pays for Mr. Anderdon's shares ? The £ 2,500 and £ 2,668-12sh.-5 d. come out of the whole concern, and therefore Mr. Anderdon's share was purchased in the proportion of two-thirds and one-third, two-thirds by Mr. Robley, and one-third by Mr. Brooke. Whatever was due upon Mr. Anderdon's share, comes out of the same fund, and is borne in the same proportions. Then look at the sixth article, which provides that in the event of Mr. Anderdon dying, the whole is to be divided in these proportions of two-thirds and one-third. The event contemplated (the death of Mr. Anderdon) being provided for in this way, raises a very strong probability that in the same way an event not provided for, a *causes omissus* that of Mr. Anderdon retiring and not dying, should be provided for in like manner, unless proof to the contrary could be shown. This consideration would be enough to throw the onus of proof on the other side, which onus has not been discharged, and without that evidence to bear me out, I must draw an inference from the facts opposed to that come to by the Vice-Chancellor."

Of the two grounds on which the decision proceeded, the first one is of material importance in the present case. Emphasis is laid on the circumstance that

1. (1833) 7 Bligh (N.S.) 90 : 5 E.R. 705.

the money required for paying off the retiring partner was provided by the partners not in equal shares but from the partnership funds which they admittedly held in the proportion of 2 : 1. This is precisely the position here. What was paid to Gaffur was undoubtedly paid out of the common assets of the partnership in which Yusuf had a half share as against the one-fourth share held by Ismail. The result of the transaction was that Gaffur's share became merged in the partnership and must be held to have been distributed in the proportion of two-thirds and one- third. Of course, it was open to the partners to enter into a special agreement with reference to the shares in which the future business was to be carried on ; but no such agreement has been proved. In support of the contention that the shares of Yusuf and Ismail were equal in the business that was carried on after the 3rd December, 1927, the respondent's learned advocate has relied upon two documents, namely, Ex. 1-A and Ex. R. Ex. 1-A is the written statement filed by the first defendant, the mother of the plaintiffs, in O. S. No. 15 of 1928, instituted by Ismail for setting aside the deed of release Ex. A executed by Gaffur on 22nd January, 1925. The second defendant and the heirs of Yusuf were made party defendants to the suit and they all filed a common written statement in which the widow of Yusuf, the first defendant in the present suit as guardian of her minor children, the present plaintiffs, stated that in the business carried on subsequent to the deed of release Yusuf Baig had a half share and Ismail a similar half share. We are not satisfied that this statement was consciously made by her with a knowledge of its implications. She was a pardanashin and it is probable that she was acting under the instructions of Ismail himself at the time. However, that may be, her admission cannot bind the present plaintiffs. Ex. R is a razinama petition on which the compromise decree of the 11th October, 1935, was passed. This will be referred to in some detail later. The only plaintiff who had attained majority at the time was the first plaintiff, the other plaintiffs being minors. Remembering that the first plaintiff could have had no knowledge of the true state of affairs, we are not disposed to attach any value to the admission contained in Ex. R, more especially as he might have been induced to join it and agreed to the shares as fixed therein by what has been previously stated in Ex. 1-A. In these circumstances no importance can be attached to these documents. The judgment of the learned Subordinate Judge shows that he is not prepared to place any great value upon these documents independently considered. On the whole we are of opinion that the share of Yusuf in the business continued after the retirement of Gaffur and has not been proved to be different from what it was before, that is to say, his share was two as against one of Ismail.

The next point pressed by the appellant is that the learned Subordinate Judge erred in declining to recognise the right of the heirs of Yusuf to a share in the value of the goodwill and the " Turkey Topee," a mark under which the beedies had been manufactured and sold. It is proved that after the death of Yusuf, Ismail continued the business in the same place, with the same assets, and with the old constituents. The old mark, namely, " Turkey Topee " mark was also used both on the beedies and the wrappers manufactured and sold by Ismail but with this difference, whereas in the old business and in the trade mark, the names of both the partners, Yusuf and Ismail, appeared, in the business carried on by the latter the name of Yusuf was dropped out. The business itself was conducted in the name of Ismail alone.

Though the term " goodwill " can hardly be said to have any precise signification, there can be no doubt, as stated by Lindley, that :

> " It is generally used to denote the benefit arising from connection and reputation ; and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its goodwill may have a marketable value, whether the business is that of a professional man or of any other person, but whether or not the goodwill has a saleable value is a question of fact to be determined in each case. But it is plain that goodwill has no meaning except in connection with a continuing business ; it may have no value except in connection with a particular house, and may be so inseparably connected with it as to pass with it under a will or deed without being specially mentioned."

(Lindley on partnership, 10th edition, page 523).

On the principle just mentioned we have little doubt that the partnership in question had a goodwill and possessed a saleable value as an asset of the partnership. Nor is there any doubt that Ismail managed to obtain the benefit of that goodwill for the business that he carried on after the death of Yusuf. By the decree passed by the Subordinate Judge the plaintiffs have been given a share in the profits and properties acquired out of the business carried on by Ismail using the goodwill and the Topee mark of the old partnership.

The only question is whether the heirs of Yusuf are now entitled to demand the sale of the goodwill and the " Turkey Topee " mark inseparably connected with it. Whatever the ancient view might have been, it is now settled that the goodwill of a business is an asset like any other asset and the representatives of a deceased partner are entitled to a share in it. Indeed as Romer, J., points out in *David and Mathews* In re[1], the goodwill of the business would be an asset, and might well be the most valuable asset of the partnership and the executors of a deceased partner in the absence of a special provision in the partnership contract would be entitled to require that the goodwill be sold together with the other assets for the purposes of division between the executors and the surviving partner. If action be taken in time, the surviving partner could be restrained by an injunction from appropriating the goodwill or in any way rendering it less valuable. In the case cited it is clearly laid down that:

> " If, then, it is not permissible for a surviving partner to appropriate to himself the goodwill of the partnership business, it follows that he ought not to do so, and in case of necessity would be restrained by the Court, pending a sale of the goodwill for the benefit of the partnership, from doing any act in excess of his rights which if not stopped, would enable him to obtain the goodwill or any part of it."

In the present case it is abundantly clear that the goodwill has been fully appropriated by Ismail with all the advantages flowing from the old business connections and the " Turkey Topee " mark. It is therefore impracticable to direct a sale of the goodwill which has now ceased to exist after all these years. So far as the trade mark is concerned, it is inseparably connected with the goodwill and cannot be assigned to or apportioned among the persons who are not entitled to the business concerned in the goods for which it has been used. It may be that the " Turkey Topee " trade mark has a saleable value on account of the reputation it has in the market, but it cannot be sold independently of the business. That being so, the only way to do justice between the parties is to direct a valuation of the trade mark to be made by a Commissioner appointed for the purpose and give to the heirs of Yusuf their shares in the value to be arrived at. The value to be ascertained is the value as at present. A direction to this effect shall be inserted in the decree. It is, of course, to be understood that Ismail is entitled to carry on the business in his own name with the right of using the " Turkey Topee " mark in the business.

It only remains to consider the objection of the second respondent Ismail's advocate, that the decree of the Court below should not be disturbed except in so far as the third defendant Gaffur is concerned. To appreciate the point, it is necessary to refer to a few facts. There was a compromise of the suit as between all the parties except Ismail and a petition, I. A. No. 1555 of 1935 was filed for a decree being passed in terms of the compromise. On the 11th October, 1935, the Subordinate Judge decreed the suit in terms of the compromise so far as the parties thereto were concerned and as against Ismail the third defendant who did not join the compromise the Court proceeded *ex parte* and as the plaintiffs were willing to have a decree against him in terms of the compromise a decree in those terms was passed against him as well. On the 9th November, 1935, the third defendant applied to the Court for having the *ex parte* decree set aside and an order as prayed was made on the 13th February, 1937. The question is as to whether the entire decree so far as the other parties to the compromise were concerned was set aside by the order or only so much of it as was against the third defendant. Looking at the language of the order, it seems to us that the intention of the Court was to set aside the decree as a whole which it has undoubtedly the power to do. Not only is there nothing

1. (1899) 1 Ch. 378.

in the decree to indicate that it was set aside only as against the third defendant, but, as the learned Subordinate Judge points out, the share of the third defendant, cannot be determined unless the share of Yusuf is clearly settled which again cannot be done unless the suit as a whole is reopened. The terms of the compromise also show that the arrangements made by it proceeded on the footing that all the heirs including the third defendant who had purchased the shares of Yusuf's parents were to be bound and have their rights governed by the compromise. In other words, it was the substratum of the compromise that the third defendant should be equally bound by it and it cannot in its nature be set aside as against him without being set aside against the actual parties to the compromise.

In the result, the decree of the Court below should be modified in the manner indicated above. The appellants 1, 4 and 5 are entitled to their costs throughout from the second respondent.

B.V.V. ——— *Decree modified.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Kanduri Lakshmiah Chetty and another ... *Appellants**

*v.*

The Adoni Electric Supply Company, Limited, Adoni, by Managing Agents, Messrs. T. R. Rao and Co., by partner and director, Mr. N. Vembu and another .. *Respondents.*

*Company law—Shareholder failing to pay for shares subscribed for by him—Forfeiture of shares by company after notice to shareholder—Notice not in accordance with articles of association—Forfeiture not valid.*

No forfeiture of property could be made unless every condition precedent had been strictly and legally complied with. A very little inaccuracy is as fatal as the greatest.

Where a limited liability company forfeited the shares of a shareholder on the ground that he did not pay for the shares subscribed for by him and the articles of association provided that the notice shall name a day (not being less than 14 days from the date of notice) and a place or places on and at which the call or instalment and interest and expenses are to be paid, but the notice issued by the company to the shareholder did not state where the payment should be made and did not correctly state the dates on which the calls were to be met,

*Held*, that the notice was inaccurate and bad and that the forfeiture of shares was invalid.

*Alexander* v. *Automatic Telephone Co.*, (1900) 2 Ch.D. 56 and *Johnson* v. *Lyttle's Iron Agency*, (1877) L.R. 5 Ch. Div. 687, followed.

Where a company makes a call for payment from a shareholder for his share, the company is entitled to interest from the date of call.

Appeals against the decrees of the District Court of Bellary in O.S. Nos. 33 of 1940 and 12 and 10 of 1941 respectively.

*Messrs. U. Lakshmanna* and *R. Karunakaran* in Appeal No. 137 of 1942; *M. S. Ramachandra Rao* and *D. R. Krishna Rao* in Appeal No. 190 of 1942; *V. S. Narasimhachar* in Appeal No. 216 of 1942, for Appellant.

*Messrs. V. S. Narasimhachar* in Appeals 137 and 190 of 1942, *A. Bhujanga Rao* and *D. R. Krishna Rao* in Appeal No. 216 of 1942 for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—These three appeals arise out of different suits filed in the Court of the District Judge of Bellary. The cause of action was the same in each case and as the actions were tried together the trial Court dealt with them in one judgment. It will be convenient to adopt the same course here.

We will first state the facts in Appeal No. 137 of 1942. The plaintiff is a limited liability company. It was registered on the 3rd November, 1932, with a nominal capital of Rs. 3,00,000, divided into 3000 shares of Rs. 100 each. The object for which the company was formed was the supply of electricity to the town of Adoni. The appellant signed the memorandum of association as a

*Appeals Nos. 137, 190 and 216 of 1942. 23rd November, 1943.

subscriber for 50 shares, but the Articles of Association do not state the date on which a subscriber has to make payment. In *Alexander* v. *Automatic Telephone Co.*[1] the Court of Appeal held that, in the absence of any special agreement or article requiring a subscriber of the memorandum of association of a company to make some payment on application or allotment, nothing is payable by him in respect of his shares until a call is made upon him. On the 20th September, 1935, the company wrote to the appellant demanding payment of Rs. 25 per share as money due on application and Rs. 25 per share as money due on allotment. One month's time was given for the payment. The demand was not complied with. On the 9th October, 1937, the company made a call of 25 per cent. to be paid on the 10th November, 1937 and on the 3rd August, 1938, made another call for the payment of the balance by the 11th September, 1938. These calls were not met. On the 4th October, 1939, the company gave notice of forfeiture of the appellant's shares, and he was informed that unless he paid what was owing by him in respect of the 50 shares, with interest at six per cent. before the 31st October, his shares would be forfeited. Article 63 of the Articles of Association gives the company the power of forfeiting shares for the non-payment of calls or instalments. This notice was ignored and on the 27th December, 1939, the directors passed a resolution forfeiting the appellant's shares. On the 4th November, 1940, the suit out of this appeal arises was filed. The appellant advanced numerous pleas in defence. *Inter alia* he alleged that he had been induced to sign the memorandum of association as the result of fraud practised by the promoter of the company, that the suit was barred by the law of limitation and that in any event the forfeiture of his shares was unlawful as the requirements of the articles of association had not been complied with. The District Judge found against the appellant on all the issues. Consequently he passed a decree for Rs. 5,000 due on the shares with interest at six per cent. from the date of suit. In his memorandum of appeal the appellant raised all the contentions to be found in his written statement, but the only contention which has been pressed at the hearing of the appeal is the one that the forfeiture of the shares was unlawful. The company has filed a memorandum of cross-objections as it contends that the learned District Judge erred in not allowing interest from the date of the respective calls.

The contention that the forfeiture was invalid is well founded. Article 62 of the articles of association states that the notice shall name a day (not being less than 14 days from the date of the notice) and a place or places on and at which the call or instalment and interest and expenses are to be paid. The notice issued to the appellant did not state where the payment should be made and did not correctly state the dates on which the calls were to be met. For the purpose of calculating interest it was necessary that correct dates should be stated. In *Johnson* v. *Lyttle's Iron Agency*[2], the Court of Appeal held that a forfeiture was invalid where the notice claimed interest from the date of the call, instead of from the date fixed for payment. In that case, James L.J., observed,

"It was the established rule of the Court of Chancery and of the Courts of Common Law that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with. A very little inaccuracy is as fatal as the greatest. Here the notice is inaccurate. It is therefore bad, and the forfeiture is invalid."

The position is the same here and we must hold that the appellant's shares have not been forfeited.

If the appellant does not pay for his shares, the company can of course, still forfeit them if it takes proper steps. The appellant is undoubtedly liable to the company in the principal sum of Rs. 5,000 with interest on Rs. 2,500 from the 20th October, 1935 (the date on which he should have paid the application and allotment money), on Rs. 1,250 from the 10th November, 1937, and on Rs. 1,250 from the 11th September, 1938. As the appellant has signified his willingness to

1. (1900) 2 Ch.D. 56. 2. (1877) 5 Ch.D. 687.

meet his liability we will vary the decree of the trial Court by declaring that the forfeiture is invalid and that the appellant is entitled to remain on the register as the holder of 50 shares, provided he pays Rs. 5,000 with interest as specified above, and the costs awarded by the lower Court within two months of this date. If he fails to make the payment within the time specified, his appeal will stand dismissed with costs and the memorandum of cross objections will be allowed with costs. To this the appellant agrees.

The facts in Appeal No. 190 of 1942, are the same except that the Appellant only subscribed for ten shares. By consent, there will be a similar order passed here. Interest will run in respect of Rs. 500 from the 20th October, 1935, on Rs. 250 from the 10th November, 1937, and on Rs. 250 from the 11th September, 1938. The appellant will also be allowed two months' time in which to pay the principal and interest, plus the costs awarded by the trial Court. If he fails to make such payments in full his appeal will stand dismissed with costs.

The company is the appellant in Appeal No. 216 of 1942. The respondent signed the memorandum of association as a subscriber for ten shares. He pleaded that he was not liable to pay as the promoter of the company had agreed to allot these shares to him for legal services rendered in connection with the promotion of the company. The District Judge held that the respondent was not liable because he considered that it was a case where strictly legal considerations must give way to equity. He went on to observe,

> "My difficulty in finding on this issue arises mainly out of a chaotic muddle industrial concerns so often pass through amongst the mazes of Indian Company Law without skilled and expert guidance by specialised lawyers who can guide them aright. A broad, liberal and sympathetic view therefore I consider has to be taken by Courts in dealing with claims such as this as to apply strict law without invoking equity might result in substantial injustice."

We certainly cannot subscribe to this opinion. The case has to be decided on the law and only on the law. The respondent subscribed to the memorandum of association and therefore is liable to pay for his share in cash. If he did in fact enter into an arrangement with the promoter of the company under which he was to receive ten shares for his service, the position would be altered. The decree of the District Judge must be set aside with costs in the trial Court. As the respondent is agreeable to the same orders being passed in this case as in the other appeals there will be a declaration that the respondent is entitled to remain on the register as a holder of ten shares, provided he pays the principal sum of Rs. 1,000 with interest as payable by the appellant in Appeal No. 190 of 1942, and the costs of the company in the trial Court within two months. In default, the company will get a decree as prayed for with costs throughout.

V.P.S. *Decree varied.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Sri Meenakshi Mills Ltd., a limited Company at Madura by managing agents K. R. M. T. T. Thiyagaraja Chettiar and Co. *Petitioners**

*v.*

C. Swaminatha Mudaliar and Brother by one of its partners S. Arokiaswami Mudaliar and another .. *Respondents.*

*Partnership Act (IX of 1932) Section 69 (2)—Suit by son of deceased partner—Failure to obtain correction of register—Non-compliance with Section 69 (2)—Effect.*

Section 63 (1) of the Partnership Act provides for correction of the register when changes occur in the constitution of a registered firm. Where the son of a deceased partner has not had his name included in the register, Section 69 (2) of the Act operates as a bar to any suit by him as a partner. The registration of the father's name does not hold good for the son as if the relationship were that of a coparcenary.

*C.R.P. No. 885 of 1942. 4th January, 1944.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Madura in S. C. S. No. 225 of 1940.

*K. V. Srinivasa Aiyar* for Petitioners.

*T. K. Subramania Pillai* for Respondents.

The Court delivered the following

JUDGMENT.—The learned Subordinate Judge has overlooked the mandatory provisions of section 69 (2) of the Indian Partnership Act. The suit was brought by the son of a deceased partner, and it is now argued that the registration of the father's name holds good for the son, as if the relationship were that of a coparcenary. Section 63 (1) of the Act provides for the correction of the register when changes occur in the constitution of a registered firm; as the plaintiff has not had his name included in the register, section 69 (2) is a bar. The suit is not maintainable and it is ordered to be dismissed with costs throughout.

K.S. ——— *Petition allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

B. K. Narayanaswami Chettiar .. *Appellant**

*v.*

Gurukkar Rudrappa and another .. *Respondents.*

*Madras Agriculturists' Relief Act (IV of 1938), section 7—Properties sold in execution of a decree—Third party purchaser—Confirmation of sale pending—Debt scaled down under Act IV of 1938—Deposit by judgment-debtor in Court of the amount due under the amended decree—Whether sale can be set aside.*

The properties of a judgment-debtor were sold in execution of a decree and a third party was the auction-purchaser. The confirmation of the sale had not been made, and in the meanwhile the Madras Agriculturists' Relief Act, was passed as a result of which the debt was scaled down, and the judgment-debtor deposited in Court the amount due under the amended decree and then sought to have the sale set aside under section 7 of the Act.

*Held,* that under section 7, there can be no question of the decree-holder 'proceeding against' the property at the stage when the Court is called upon to confirm the sale and that in the circumstances, the confirmation of the sale in favour of the auction-purchaser will not contravene the provisions of the section and the sale must stand.

*Velayuda Mudali* v. *Changama Naidu,* (1942) 2 M.L.J. 311, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in A.S. No. 7 of 1943, dated 20th July, 1943, preferred against the order of the Court of the District Munsiff of Tiruvadi, dated 24th February, 1942, and made in E.A. No. 19 of 1942, in E.P. No. 319 of 1934, in O.S. No. 216 of 1931, District Munsiff Court, Kollegal.

*K. Rajah Ayyar* and *V. Seshadri* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *P. S. Raghavarama Sastri* and *N. Rajagopala Ayyangar* for Respondents.

The Court delivered the following.

JUDGMENT.—This appeal arises out of an application made by the appellant to set aside an auction sale of certain properties belonging to his family in execution of a decree for about Rs. 1,000 obtained against him and his coparceners. The sale was held on 19th September, 1935, and the properties were purchased by the second respondent herein, a stranger, but the sale was not confirmed as the judgment-debtors applied to have the sale set aside under Order 21, rule 90, Civil Procedure Code. While the said proceeding was dragging on its weary length through the various Courts—it is said to be still pending in some form in this Court—the Madras Agriculturists' Relief Act was passed on the 22nd March, 1938, and the decree was amended on 26th September, 1939 by scaling down the amount due thereunder to a sum of Rs. 448-7-6 only in accordance with the provisions of that Act. Thereupon the appellant deposited the said sum in Court

* A.A.A.O. No. 266 of 1943. 26th November, 1943.

on 5th January, 1940, to be paid to the decree-holder in satisfaction of the amended decree and made the present application to set aside the sale as the decree was otherwise satisfied as aforesaid. The application having been dismissed in both the Courts below, this appeal has been preferred to this Court.

It is conceded for the appellant that section 23 of the Madras Agriculturists' Relief Act, which provides, as part of the scheme of relief afforded by the Act, for setting aside a sale or foreclosure of any immovable property "sold or foreclosed on or after the 1st October, 1937," on certain conditions being fulfilled, has no application here. But it is urged that section 7 of the same Act has by necessary implication, a wider operation and has the effect of nullifying sales held even before 1st October, 1937, quite irrespectively of the conditions specified in section 23, provided only such sales had not been confirmed before the commencement of the Act. The second paragraph of section 7 on which reliance is placed runs as follows:

"No sum in excess of the amount as so scaled down shall be recoverable from him or from any land or interest in land belonging to him; nor shall his property be liable to be attached and sold or proceeded against in any manner in the execution of any decree against him in so far as such decree is for an amount in excess of the sum as scaled down under this Chapter."

It is said that confirmation of a Court sale is a necessary and integral part of an execution proceeding and that in having such a sale confirmed, the decree-holder is still "proceeding" against the property in execution of his decree; wherefore, it is argued, to allow the sale in favour of the second respondent to be confirmed after section 7, has come into force would be tantamount to allowing the appellant's property to be "proceeded against" in execution of the original decree for the larger amount, so as to contravene the mandatory provisions of section 7. This argument proceeds on a misapprehension of the effect of a sale in execution of a decree and its subsequent confirmation by the Court under the provisions of the Civil Procedure Code. As pointed out by their Lordships in *Seth Nanhalal* v. *Umrao Singh*[1] when once an execution sale has been carried out the interest of the auction-purchaser comes into being and such interest can be displaced only in one of the modes sanctioned by the law, the Court being otherwise under an obligation to confirm the sale. Further more Order 21, rule 93 of the Code, clearly implies that the proceeds of the sale may be paid to the decree-holder before the date of its confirmation. It will thus be seen that the process of realisation is complete subject only to a liability to refund the purchase money on a setting aside of the sale if any under rule 92. There can be no question therefore of the decree-holder "proceeding against" the property at the stage when the Court is called upon to confirm the sale. It follows that the confirmation of the sale in favour of the second respondent will not contravene the provisions of section 7 and the sale must stand.

There is no direct authority on the point but reliance was placed by the learned counsel for the appellant on *Velayudha Mudali* v. *Changama Naidu*, where this Court held that proceedings for setting aside an execution sale under Order 21, rule 90, were liable to be stayed under section 20 of the Agriculturists' Relief Act, as execution proceedings and it was said that this implied that confirmation which has to follow on the dismissal of an application to set aside the sale, is also part of the execution proceeding falling under section 7. This argument is in my opinion fallacious. It is one thing to say that confirmation of a sale held in execution of a decree is part of the proceeding to execute the decree in the sense that it relates to the discharge or satisfaction of the decree, but it is a different thing to hold that in confirming a sale the Court is allowing the property already sold to be "proceeded against" in execution of the decree. Indeed, it was recognised in that case itself that a sale which took place before 1st October, 1937, could not be set aside under the Act. The effect of an order

1. (1930) 60 M.L.J. 423; 58 I.A. 50 (P.C.).
2. (1942) 2 M.L.J. 311.

under section 19 is only to reduce the amount due to the decree-holder and there is nothing in the Act to indicate that such an order affects an execution sale held before 1st October, 1937, especially when a third party has purchased the property at such sale.

The appeal fails and is dismissed with costs; leave refused.

V.P.S. *Appeal dismissed.*

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[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT, MR. JUSTICE WADSWORTH, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE PATANJALI SASTRI.

Kotha Govindarajulu Chettiar .. *Applicant**

*v.*

The Commissioner of Income-tax, Madras .. *Respondent.*

*Income-tax Act* (*XI of* 1922) (*as amended in* 1939), *section* 25 (4)—*Separation of joint Hindu family and continuation of family business by the members in partnership—Joint family business assessed under Income-tax Act of* 1918—*Right of manager of family to the benefits of section* 25 (4) *of the Act of* 1922—*Partnership, if succeeds to family business within the meaning of section* 26 (2) *of the Act.*

When a Hindu joint family separates and its members carry on the family business in partnership there is a change of ownership. The business is no longer owned by the joint family but by the firm, an entirely different entity, and the fact that as before the profits continue to be divided equally between the same persons makes no difference. When such a change takes place, there is succession within the meaning of section 26 (2) of the Income-tax Act. That being the case the manager of the joint family is entitled to the benefit of section 25 (4): Under section 25-A the family had notwithstanding the partition to be regarded as joint for the purpose of assessment, which must include the grant of relief under section 25 (4).

*Jepudy Kesava Rao* v. *The Commissioner of Income-tax, Madras,* (1935) 70 M.L.J. 13: I.L.R. 59 Mad. 377 (F.B.); *Thontepu Chinna Pullayya* v. *The Commissioner of Income-tax, Madras,* (1936) 9 I.T.C. 377 (F.B.); and *The Commissioner of Income-tax, Bombay* v. *Jaisinghbai Ugarchand,* A.I.R. 1938 Bom. 350, dissented from.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Income-tax Act, XI of 1922, as amended by section 92 of the Income-tax (Amendment) Act, VII of 1939, in Application No. 66 R.A. 17 Madras of 1942-43 on its file for decision on the following question of law, *viz.*, whether in the circumstances of the case the assessees are entitled to the relief contemplated by section 25 (4) of the Income-tax Act.

*P. R. Srinivasan* and *V. R. Srinivasan* for Applicant.

*C. S. Rama Rao Sahib* for *K. V. Sesha Aiyangar* for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—The assessee was the manager of a joint Hindu family the members of which carried on a money lending business. On the 20th April, 1940, a partition was effected, but the erstwhile coparceners decided to continue the business in partnership. A formal deed embodying the terms of separation was executed on the 10th May, 1940. The joint family consisted of an uncle and two nephews. Although as members of the joint family they had equal shares in the business, it was agreed that the uncle, who had been the managing member, should have a larger share than each of his nephews. The ratio was to be 26:19:19. For the year of account (1939—40) the Income-tax Officer calculated that the income of the family was Rs. 46, 127, of which Rs. 44,420 had been derived from the business. By consent the year of account was deemed to commence on the 13th April, 1939, and to end on the 20th April, 1940. The extra days were added in order that the end of the financial year should coincide with the date of the partition. The total tax due on this assessment was Rs. 6,129, which the Income-tax Officer directed should be

*Case Referred No. 23 of 1943. 17th December, 1943.

recovered equally from each of the three groups into which the family had been divided. The assessee was the managing member and as such he objected to the assessment. The business had been assessed under the Income-tax Act of 1918. He claimed that the partnership had succeeded to the business of the joint family within the meaning of section 26 (2) of the present Act and therefore the joint family was entitled to the relief contemplated by section 25 (4). Relying on the decision of this Court in *Thontepu Chinna Pullayya* v. *Commissioner of Income-tax, Madras*[1] the Income-tax Officer rejected the contention. The judgment in that case rendered full support for his action. He was asked to ignore the judgment because other High Courts had taken a different view. As he was functioning within the jurisdiction of the Madras High Court, the Income-tax Officer very properly considered himself to be bound by that case. The appellate Assistant Commissioner upheld the decision of the Income-tax Officer, as did the Income-tax Appellate Tribunal, Calcutta Bench. At the request of the assessee and in view of the conflict disclosed by the reported cases the Tribunal referred the following question for the opinion of this Court:

"Whether in the circumstances of the case the assessees are entitled to the relief contemplated by section 25 (4) of the Act?"

The reference has been placed before a Bench of five Judges as it calls for the reconsideration of the judgment in *Thontepu Chinna Pullayya* v. *Commissioner of Income-tax, Madras*[1], and of an earlier case of this Court, each of which was decided by a Bench of three Judges.

Before entering upon a discussion of these cases the position under the Act of 1918, and the position under the Act of 1922, as now amended, should be stated. Under the Act of 1918, the tax was levied on the income actually earned in the year of assessment. The Act of 1922 made a great change. It provided that the tax levied in the year of assessment should be calculated on the income earned in the previous year. In order to prevent the injustice of the double assessment of a person who was assessed under the Act of 1918 when he ceased to be chargeable under the Act of 1922, section 25 was inserted in the new Act. Sub-section (3) of section 25 deals with the case where a business, profession or vocation is discontinued and sub-section (4) with the case where a person has succeeded to a business, profession or vocation. In the present case we are concerned only with the question of succession. Sub-section (4) reads as follows:

"Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939, carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

Therefore if the partnership with which this case is concerned can be regarded as having "succeeded" to the business of the joint family, the members of the family are entitled to the benefit of section 25 (4). A joint family was a taxable entity under the Income-tax Act of 1918, and continues to be so under the later Act. Section 3 of the Act of 1922 says that the tax shall be charged in respect of the total income of the previous year of every individual, Hindu undivided family, company, and local authority, and of every firm and other association of persons, or the partners of the firm or members of the associa-

1. (1936) 9 I.T.C. 377 (F.B.).

tion individually. The joint family of which the assessee was the head was a taxable entity under the Act of 1918, and continued to be such under the Act of 1922 until the partition in 1940. Section 2 (9) of the Act of 1922 states that the word "person" includes a Hindu undivided family and a local authority.

The earlier case on which *Thontepu Chinna Pullayya* v. *Commissioner of Income-tax, Madras*[1], is based is *Jupudy Kesava Rao* v. *Commissioner of Income-tax, Madras*[2]. There an undivided Hindu family consisted of the assessee, his wife and his father. They carried on a family business and after the father's death the assessee continued it. The question was whether it could be said that the assessee had succeeded to the business within the meaning of section 26 (2). It was held that he was not within the section. In delivering the judgment of the Court, Madhavan Nair, J., who was officiating as the Chief Justice, observed:

"The terms 'the person carrying on any business, profession or vocation has been succeeded in such capacity by another person' may well suggest that what is contemplated is merely succession in the management of business by another person; but obviously that cannot have been the intention of the Legislature. It appears to us that the word 'succession' as used in the section connotes a transfer of ownership and the person who succeeds another must have by such succession become the owner of the business which his predecessor was carrying on and which he after the succession carries on in such capacity, that is, the capacity as owner. If this view is correct, as we think it is, then it seems fairly clear that the undivided Hindu family which was carrying on business has not been 'succeeded' in such capacity by the petitioner, as the petitioner was himself in part the owner of the property already, and as such there has been no transfer of ownership in the business as he has become entitled to it by survivorship."

As the Full Bench which decided the *Commissioner of Income-tax, Madras* v. *Karuppiah Pillai*[3] pointed out, the decision in *Jupudy Kesava Rao* v. *Commissioner of Income-tax, Madras*[2], was that it was not a matter of succession by another person at all. It was a matter of survivorship. The family remained joint notwithstanding the death of the member. In no sense of the word could it be said that there was succession or change in the identity of the assessee. If the decision in *Jupudy Kesava Rao* v. *Commissioner of Income-tax, Madras*[2], that section 26 (2) did not apply had been based on this ground without reference to transfer or change of ownership, the judgment would not be open to question so far as the application of section 26 (2) was concerned. The entity for assessment during the lifetime of the father was the joint family and after his death the entity still remained the joint family, then represented by the assessee as the only male member. As the entity remained the joint family, there could be no question of succession and therefore section 26 (2) could not apply.

In *Thontepu Chinna Pullayya* v. *Commissioner of Income-tax, Madras*[1], the facts were similar to the facts of the present case. The members of a Hindu undivided family separated and thereafter the members continued the family business in partnership. The question was whether the assessment of the total income of the family up to the date of separation should be made on the firm as successors of the undivided family within the meaning of section 26 (2) or on the members as if no separation or partition had taken place according to section 25-A (2) of the Income-tax Act. After quoting the passage which we have quoted from the judgment of Madhavan Nair, Officiating Chief Justice, in *Jupudy Kesava Rao's case*[2], Beasley, C.J., with whom the other members of the Court agreed, said:

"Applying the test laid down there to the present case, there seems to me to have been no change of ownership at all. All the members of the new firm were members of the undivided family and they now have the same share in the business of the firm as they had in the family business at the date of the partition. Applying that case to this,

1. (1936) 9 I.T.C. 377 (F.B.).
2. (1935) 70 M.L.J. 13: I.L.R. 59 Mad. 377 (F.B.).
3. (1941) 1 M. L. J. 120: I.L.R. (1941) Mad. 220 (S.B.).

the answer to the question propounded must be that the assessment must be in accordance with section 25-A (2) of the Income-tax Act."

There is here an obvious fallacy. When a Hindu joint family separates and its members carry on the family business in partnership, there is a change in ownership. The business is no longer owned by the joint family but by the firm, an entirely different entity, and the fact that as before the profits continue to be divided equally between the same persons makes no difference. When such a change takes place, there is succession within the meaning of section 26 (2). That being the case, the assessee here is entitled to the benefit of section 25 (4).

On behalf of the Commissioner of Income-tax it has been suggested that section 25 (4) cannot apply to a joint Hindu family which has ceased to exist as the result of partition, but it is obvious that this contention is unsustainable. Under section 25-A the assessee's family had, notwithstanding the partition, to be regarded as joint for the purpose of assessment, which must include the grant of relief under section 25 (4).

The High Courts whose judgments conflict with *Thontepu Chinna Pullayya* v. *Commissioner of Income-tax, Madras*[1], are Allahabad and Lahore. In 1927, In the matter of *The Firm Nihal Chand, Kishore Lal*[2], the Allahabad High Court held where the members of a Hindu joint family who have carried on business as a family convert themselves into a registered firm the partnership must be deemed to be the successor of the joint family within the meaning of section 26. There are three decisions of the Lahore High Court to the same effect: *Beli Ram Bros.* v. *Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces*[3], *Mitter Chand Lakshmidas* v. *Commissioner of Income-tax*[4], and *Ram Raksh Mal and Sons, Ltd* v. *Commissioner of Income-tax, Punjab*[5]. It is not necessary to examine these judgments in detail as we have given our own reasons for dissenting from what was said in *Jupudy Kesava Rao* v. *Commissioner of Income-tax, Madras*[6] and *Thontepu Chinna Pullaya* v. *Commissioner of Income-tax, Madras*[1].

The same question was raised in the Bombay High Court in *Commissioner of Income-tax, Bombay* v. *Jesinghbai Ugarchand*[7]. On the ground that it was not desirable that conflicting decisions under the Income-tax Act, which applies to the whole of British India, should be given by different High Courts on exactly similar facts the Bombay High Court followed the decision of this Court in *Thontepu Chinna Pullayya* v. *Commissioner of Income-tax, Madras*[1], without expressing any opinion of its own. The attention of the Bombay High Court was apparently not drawn to the conflict which already existed. We agree, of course, that it is very desirable that conflict should be avoided as far as possible. Otherwise it will mean that the tax will not be levied on the same basis on all persons who are subject to the provisions of the Act. Conflict cannot, however, always be avoided and it is just as desirable that an erroneous decision should be corrected when the opportunity occurs.

For the reasons given our answer to the question referred is that in the circumstances of the case the assessees are entitled to the relief contemplated by section 25 (4) of the Act.

The assessees have succeeded and will have their costs. We fix the advocate's fee at Rs. 250.

K.S. ——— *Reference answered.*

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1. (1936) 9 I.T.C. 377 (F.B.).
2. (1927) I.L.R. 49 All. 611.
3. (1935) 8 I.T.C. 380.
4. I.L.R. (1937) Lah. 189.
5. I.L.R. (1937) Lah. 325.
6. (1935) 70 M.L.J. 13: I.L.R. 59 Mad. 377 (F.B.).
7. A.I.R. 1938 Bom. 350.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

R. Manicka Chettiar .. *Appellant**

*v.*

The Official Assignee of Madras .. *Respondent.*

*Suit on hypothecation deed—Attachment of movables before judgment—Insolvency of debtor and adjudication—Attachment automatically raised and vesting of properties in Official Assignee—Rights of creditor.*

Where pending a suit for recovery of money under a hypothecation deed, attachment of movable properties of the debtor was effected, but before final decree was passed, the insolvency of the debtor brought in the Official Assignee in whom the properties vested, on the question whether the Official Assignee can have the attachment cancelled,

*Held,* (1) that the result of the adjudication of the debtor as insolvent was that the attachment got cancelled and the property became vested in the Official Assignee; and (2) that even if the attachment had been made with the consent of the debtor, it cannot give better rights to the creditor than what an attaching creditor would ordinarily have.

Appeal against the order of the City Civil Court, Madras, dated 21st April, 1943, and made in C.M.P. No. 636 of 1943 in O.S. No. 1794 of 1942.

*A. B. Nambiar* for Appellant.

*K. C. Jacob* and *S. K. C. Ratan* for Respondent.

The Court delivered the following

JUDGMENT.—The appellant is the plaintiff in O. S. No. 1794 of 1942 on the file of the City Civil Court, Madras. He filed his suit for recovery of money due under a hypothecation deed. Pending the suit he applied for attachment before judgment of the judgment-debtor's movable properties. They were attached. The preliminary decree was passed but no final decree has yet been passed. Subsequent to the attachment, the defendants were adjudged insolvents and the Official Assignee in whom the properties of the defendants had vested filed a petition purporting to be under Order 22, rule 10, Civil Procedure Code, for impleading him as a supplemental defendant and also for raising the attachment. When the petition came on for hearing, objection was taken to the Official Assignee clubbing two prayers in one petition. He accordingly did not press the prayer for being impleaded as a party, but prayed for cancellation of the attachment and delivery of the attached properties to him on the ground that he was entitled to the attached properties by virtue of the order of adjudication. The appellant opposed the application. His contention was that by reason of the attachment, the properties must be considered to have been earmarked for his debt and that therefore the properties ought not to be handed over to the Official Assignee. The learned City Civil Judge disallowed the claim of the appellant, cancelled the attachment and directed the properties to be handed over to the Official Assignee. Hence this appeal.

There are no disputes about the facts. The properties in question were attached before judgment and no decree has been passed which could be enforced as against the properties attached. The Official Assignee has obtained a vesting order in respect of the properties of the defendants. It has been pointed out by this Court in several rulings that an attachment does not confer upon the creditor any rights in the property and that it only amounts to a direction to the debtor not to alienate the property attached. The question was considered in *Sadayappa* v. *Ponnamma*[1]. There the attachment was followed by a sale and it was held that since the property had been sold, the Official Assignee could not ask for payment of the money to him. In *Krishnaswami Mudaliar* v. *Official Assignee, Madras*[2], it was held that an attachment before judgment would not operate when the rights under it were not exercised before the presentation of a petition in insolvency, so as to create in favour of the judgment-creditor a title which would

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*A.A.O. No. 274 of 1943. 13th December, 1943.

1. (1885) I.L.R. 8 Mad. 554.
2. (1903) 13 M.L.J. 278: I. L. R. 26 Mad. 673.

prevail against that of the Official Assignee under the vesting order in insolvency made after the order of attachment. It was held that the Official Assignee was entitled to claim the property attached on the ground that the attachment was of no effect as against him. In *Italia* v. *Official Assignee, Madras*[1], it was pointed out that no charge was created by an attachment and that when the judgment-debtor becomes an insolvent, the attachment falls to the ground, provided, of course, that the attachment has not resulted in a sale. In this case there is not even a decree which can be enforced by taking out execution against the attached properties. The result of adjudication is that the attachment got cancelled and the property vested in the Official Assignee.

It is urged for the appellant that in this particular case, there is evidence that the defendants in the suit after notice was served on them of the attachment before judgment appeared and consented to the attachment. But this will not give the creditor any further rights than what he would have if the defendants had not appeared and an order had been passed in their absence. The mere fact that there was a consent order would not clothe the creditor with better rights than what an attaching creditor would ordinarily have.

It is next urged that the only Court by which a decision on this point can be given is the Insolvency Court and not the Court in whose custody the articles were. Though the order appealed against was passed on a petition filed under Order 22, rule 10, it was not an order passed under that section. Order 22, rule 10, Civil Procedure Code, deals with the question as to against whom and by whom proceedings can be continued as representatives by reason of an assignment or devolution. In this case the Official Assignee did not want to be impleaded as a party.

He merely wanted possession of the attached properties. His claim was allowed and that claim had necessarily to be made in the Court in whose custody the articles were. The petition was therefore cognizable by the City Civil Court and the point had necessarily to be gone into for the purpose of considering the claim. It is true that if the appellant were to ask the property to be treated as earmarked for his debt, he may have to move the Insolvency Court to direct the Official Assignee to pay him the sale proceeds of these properties. But that was not a matter with which the City Civil Court was concerned. The only question which that Court was concerned with was whether the attachment subsisted so far as the Official Assignee was concerned or not.

The appeal fails and is dismissed with costs.

K.C. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Periyatan Thayyil Parvathi Amma. .. *Appellant**

*v.*

Akkalath Kalanthar and others .. *Respondents.*

*Malabar Compensation for Tenants Improvements Act (I of 1900), sections 5, 6 and 7—Improvements by tenant after an order of injunction by Court—Effect of injunction order—Tenant's right to compensation.*

Under the Malabar Compensation for Tenants' Improvements Act, the tenant is entitled to compensation for all improvements made up to the date of dispossession, even though some of the improvements may have been made after a suit for ejectment had been filed or after a decree had been passed or in disobedience of an order of the Court; and the Court has no discretion in the matter.

The passing of an order of injunction only means that at the time the order was passed, the Court was satisfied that the property was in danger of being wasted, damaged, or

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1. (1940) 2 M.L.J. 979: I.L.R. (1941) Mad. 398.

*S.A. No. 1528 of 1942. 2nd November, 1943.

alienated; but it does not mean that any act done by the tenant subsequent to the order of injunction necessarily amounted to wasting, damaging or alienating the land.

Where a tenant completed a building on a land on which originally the basement alone had been put up, after an order of injunction by the Court, the question whether erection of the building has added to the value of the holding must be decided.

Appeal against the decree of the District Court of North Malabar in A.S. No. 227 of 1941, preferred against the decree of the Court of the District Munsiff of Taliparamba in O.S. No. 158 of 1939.

*P. Govinda Menon* for Appellant.

*B. Pocker* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises from an order of ejectment and for recovery of possession of the suit property on the ground that the plaintiffs, the landlords, wanted the land for building purposes. During the pendency of the suit a temporary injunction was issued ordering the tenant not to erect any further buildings on the land. The Court below accepted the contention of the plaintiff that they wanted the land for building purposes and gave them a decree for an ejectment. It further ordered compensation to be paid by the plaintiffs to the defendant for the value of the basement of the house erected on the land because that basement had been constructed before the issue of the injunction order; but it has refused to include the value of the house, built subsequent to and in disobedience of the injunction order.

The tenant contends in second appeal that as the landlords did not prove that they needed the whole of the land for building purposes they cannot be given a decree for possession of the whole land. They however stated in their plaint that they needed the land, and the tenant did not in her written statement specifically say that even though the landlords needed land for the construction of a house they did not need the whole land. That point was raised in the lower appellate Court; but I think that the Court was right in refusing to consider it. In fact, the Court had no material on which it could decide this question. It was one that should have been raised in the written statement in which case it would have become an issue in the suit. As the learned District Judge pointed out the suit proceeded on the basis that either the landlords wanted the whole land or they did not need any of it.

The other contention put forward in this second appeal is that despite the fact that the appellant disobeyed the injunction of the Court, she is nevertheless entitled to improvements up to the date of ejectment. The wording of sections 5, 6 and 7 of the Malabar Compensation for Tenants Improvements Act has been cited; and it appears that the tenant is entitled to compensation for all improvements made up to the date of dispossession, even though some of the improvements may have been made after the suit for ejectment had been filed and even after a decree had been passed. It appears from a reading of these sections that the Court has no discretion in the matter. It must order compensation for improvements made up to the date of dispossession to be paid to the tenant; and it cannot refuse to order compensation to be paid because of some disobedience of an order of the Court. Mr. Pocker has sought to meet this difficulty by contending that the order of injunction must be considered not merely as a prohibitive order but also as a decision which would operate as *res judicata* on a question that had to be decided before an injunction order could be issued. Even so, the passing of an oorder of injunction only means that at the time the order was passed, the Court was satisfied that the property was in danger of being wasted, damaged, or alienated, it does not mean that any act done by the tenant subsequent to the order of injunction necessarily amounted to wasting, damaging or alienating the land. If, in fact, the erection of the building for which the tenant claims compensation has not added to the value of the holding, she would not be entitled to any compensation whatsoever. The question whether the erection of the building by the tenant has added to the value of the holding is a question

of fact that has not yet been decided. Even if it adds to the value of the holding, it does not necessarily follow that the increased value of the holding on account of the completion of the building is satisfactorily measured by the amount of money spent by the tenant in erecting this building.

The appeal is allowed and the first appeal remanded to the lower appellate Court for fresh disposal after re-estimating the value of the improvements down to the date of dispossession. Costs in this Court will abide the result.

V.P.S. ——— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE KUNHI RAMAN.

Sankaram Pillai .. *Appellant**

*v.*

M. S. Ananthanarayana Aiyar .. *Respondent.*

*Civil Procedure Code (V of 1908), Order 21, rule 90, proviso 1—Application under—Order for security for costs—"Admitting" of application—Issue of notice to decree-holder.*

Under the first proviso to Order 21, rule 90, Civil Procedure Code, the Court may call upon the judgment-debtor-applicant to furnish security for costs before "admitting" his application. And it is only when notice of the application is ordered to the decree-holder that the petition can be said to be admitted by the Court. The fact that an application is numbered does not mean that it is admitted at that stage.

*Narasimha Pattamahadevi* v. *Annam Naidu* (1940) 1 M.L.J. 350 and *Venkatalingam Nayanim* v. *Venkatanarasimha Nayanim,* (1942) 1 M.L.J. 403, considered.

Appeal against the order of the Court of the Subordinate Judge of Trichinopoly, dated 5th March, 1943, and made in E.A. No. 1275|40 in O.S. No. 103|36.

*P. K. Janakiram* for Appellant.

*K. V. Srinivasa Aiyar* for Respondent.

The Judgment of the Court was delivered by

*Kunhi Raman, J.*—The appeal is from the order of the learned Subordinate Judge of Trichinopoly dismissing an application made under Order 21, rule 90, Civil Procedure Code for setting aside a sale in execution. The reason why the application, which was made by the judgment-debtor in the Court below, was dismissed, was that the judgment-debtor who was called upon to furnish security under the first proviso to Order 21, rule 90, had failed to furnish such security.

It is contended on behalf of the judgment-debtor who is the appellant here that there is an error of law in the order made by the lower Court directing security to be furnished, because before that stage the petition for setting aside the sale had been "admitted." According to the proviso referred to, the Court may call upon the judgment-debtor (applicant) to furnish security before "admitting" his application. The word "admitting" in this provision of law has been construed in the decisions reported in *Narasimha Pattamahadevi* v. *Annam Naidu,*[1] and *Venkatalingan Nayanim* v. *Venkatanarasimha Nayanim*[2], as including all cases in which notice has been ordered to the decree-holder. The view taken is that when notice of application presented by the judgment-debtor is ordered to the decree-holder, then that petition is "admitted" by the Court. In the present case security was ordered before the learned Subordinate Judge directed notice to issue to the decree-holder; but it is contended that on the date of the order directing security to be furnished the petition filed by the judgment-debtor had been numbered in the Court below and that the numbering of the petition must be regarded as amounting to admitting it. We are not prepared to accept this contention as well-founded. There is no authority in support of it and the contention seems to us to be opposed to reason. We need only point out that all the civil revision petitions and second appeals that are filed in this High Court are numbered before they are posted for admission. The fact that they

*A.A.O. No. 284 of 1943. 3rd November, 1943.

1. (1940) 1 M.L.J. 350. 2. (1942) 1 M.L.J. 403.

are numbered does not mean that they are admitted at that stage. In these circumstances there is no substance in the only contention urged on behalf of the appellant and this appeal must be dismissed with costs.

* * *

B.V.V. *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

K. B. Prabhu .. *Petitioner.**

*Criminal Procedure Code (V of* 1898), *section* 403—*Previous prosecution and acquittal—Charges split up into two—Trial of one of the charges reserved—Same charge forming subject-matter of separate prosecution later on—Whether barred—General Clauses Act (X of* 1897), *section* 26.

The managing director of a company was prosecuted for criminal breach of trust, as well as for an offence under section 282-A of the Indian Companies Act in respect of payments of money for purposes not mentioned in the articles of association, but was acquitted. The prosecution had however split up the case into two and the accused had been tried only with regard to the former charge, reserving the other charge for a separate trial. So he was later on prosecuted for the offence under section 282-A of the Companies Act. On the question whether the second prosecution on the same facts as in the previous one was barred under section 403, Criminal Procedure Code,

*Held*: that since in section 403, there is a saving clause in respect of prosecutions which come within the purview of section 26 of the General Clauses Act, the provisions of section 403 barring fresh trial have no application to a case like the present, where in the earlier prosecution, the case was split up into two and the accused had been tried only for criminal breach of trust while the other charge was reserved for a separate trial.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898 praying that the High Court will be pleased to revise the judgment of the Court of Session of the South Malabar Division at Calicut, dated 10th April, 1943, and passed in C.A. No. 24 of 1943, preferred against the judgment of the Court of the Additional First Class Magistrate of Malabar, dated 24th February, 1943, and passed in C.C. No. 44 of 1942.

*A. Narayana Pai* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is a petition to revise the order of the Sessions Judge of South Malabar in Crl. Ap. No. 24 of 1943, confirming the conviction and sentence awarded by the Additional First Class Magistrate of Malabar on the petitioner in C.C. No. 44 of 1942 on his file for an offence punishable under section 282-A of the Indian Companies Act. The sentence was a fine of Rs. 51.

The petitioner happened to be the Managing Director of K. B. Prabhu & Co. He drew three sums of money on three different dates for paying instalments due for a motor car purchased by him and he was prosecuted for it as the payment of the money was not one of the purposes mentioned in the articles of association and he was convicted. Prior to then, he was prosecuted in respect of these very items of payments and also in respect of other items for the offence of criminal breach of trust but was acquitted. It is contended for the petitioner that the acquittal in the previous case which was in respect of these very items of payment is a bar to this prosecution and that consequently the conviction and sentence should be set aside.

In the previous case he was prosecuted not only for the offence of criminal breach of trust, but also for an offence punishable under section 282-A of the Indian Companies Act. But then the prosecution split up the case into two and the accused was tried only with regard to the charge for criminal breach

*Crl. R. C. No. 507 of 1943. 3rd December, 1943.
(Crl. R. P. No. 460 of 1943).

of trust reserving the other charge for a separate trial and he having been acquitted, there was a trial in respect of this charge and he has been convicted.

It is not disputed that the facts on which this charge is laid form part of the facts in respect of which there was the previous charge for criminal breach of trust. But then the prior charge was in respect of an offence punishable under the Indian Penal Code whereas this charge is in respect of an offence punishable under the Indian Companies Act. Under section 403 of the Criminal Procedure Code,

"A person who has been once tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237."

It is true that there was an additional element required namely *mens rea* with regard to the charge for criminal breach of trust, which is not necessary for the charge under section 282-A of the Indian Companies Act. But even if it be construed as being a subsequent prosecution on the same set of facts, still there is section 403 (5) of the Code which runs thus:

"Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or of section 188 of this Code."

Under section 26 of the General Clauses Act,

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

This section therefore clearly contemplates the possibility of two separate prosecutions in respect of two different offences, though the accused can be punished only once. Since in section 403 there is this saving clause in respect of prosecutions which come within the purview of section 26 of the General Clauses Act, it will have to be held in this case that by reason of that saving clause, the provisions of section 403, Criminal Procedure Code, cannot apply. Consequently the conviction and sentence have to be upheld. The petition is dismissed.

K.C. *Petition dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Raja Veerabasava Chikka Royal Y. B. Varu Zamindar and Receiver of Punganur estate .. *Petitioner.**

*Madras Local Boards Act (XIV of 1920), sections 171 and 207—Private market—Continuance after new Act—Omission to obtain licence—Offence if committed—Receiver of property—Duty to apply for licence—Prosecution under section 207—Prior sanction of Court if necessary.*

Where a private market which was in existence before the Madras Local Boards Act of 1920 was passed is continued after the Act came into operation, the owner is bound to take out a licence as required by section 171 of the Act, and is liable to be convicted under section 207 of the Act for his omission to do so.

Where the law requires a person having a private market to take out a licence, a receiver of the property is under a similar duty to take out a licence or to take the orders of the Court. When he has not taken any such orders and is being prosecuted, the prosecution is not improper by reason of the fact that the sanction of the Court which appointed him receiver had not been obtained.

*Santokchand v. Emperor,* (1918) I.L.R. 46 Cal. 432, distinguished.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the Judgment, dated 30th October, 1942, in Criminal Appeal No. 55 of 1942 on the file of the Court of Session of Chittoor division preferred against the sentence of the Court of the Joint Magistrate of Madanapalle in C.C. No. 65 of 1942.

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*Crl. R. C. No. 70 of 1943. 16th September, 1943.
(Crl. R. P. No. 66 of 1943).

*S. Panchapagesa Sastri* for *N. C. Vijayaraghavachariar* and *N. C. Srinivasan* for Petitioner.

*A. Bhujanga Rao* for the Panchayat Board.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been convicted of an offence punishable under section 207 read with Schedule VIII and section 171 of the Local Boards Act and sentenced to pay a fine of Rs. 51 by the Joint Magistrate of Madanapalle. On appeal the learned Sessions Judge of Chittoor confirmed the conviction and sentence.

The prosecution case was that the petitioner was having a private market within the limits of the Panchayat Board of Punganur without having a license as required by section 171 of the Local Boards Act. That the petitioner did not take out a license is admitted. But what is stated for him is that he has been having this private market for a number of years without taking out a license and that he has been having it from 1880, and consequently he was not bound to take out a license. It is further stated that he was in possession of this market only as receiver appointed in the suit by the Civil Court and consequently the prosecution is invalid without the sanction of the Court which has appointed him receiver.

Section 171 of the Act runs thus:

> "No person shall open a new private market or continue to keep open a private market unless he obtains from the panchayat a licence to do so."

Under section 174 of the Act when a licence granted under section 171 does not permit the levy of any fees, it shall be granted free of charge but when such permission is given, a fee not exceeding 15 per centum of the gross income of the owner from the market in the preceding year shall be charged by the Panchayat for such license. What is stated for the petitioner is that if he is to take out a license he will have to pay a fee not exceeding fifteen per cent. of the gross income, that he has not been paying that fee all along, that the local board authorities permitted him to take the entire income from the market from as early as 1880 and, therefore, he was not bound to pay any fees. The Local Boards Act was passed long subsequent to the opening of this market. It was therefore a market which was being continued after the new Act came into operation and under section 171 of the Act even old private markets which are continued after the Act came into force could be had only after taking out a license. I am not able to see anything in Exhibits II, III or IV, the letters written by the President of the Local Boards to the petitioner's predecessor to indicate that the petitioner was to be exempt from fees leviable under later legislation. He requested the Local Board not to open any other private market in the same place and they agreed to do so on condition that he charged only the fees mentioned in the letter of the President of the Local Board. Inasmuch as admittedly the petitioner had not taken out a license and as the market is a private one and it is one continued after the Act came into force, the conviction has to be upheld. The sentence is not excessive.

With regard to the argument that the sanction of the Court which appointed the petitioner as receiver has not been taken, it is not a universal rule of law that in respect of all prosecutions against receivers the permission of the Courts which appointed them as receivers should be taken. This was pointed out in *Nagendranath Srimony* v. *Jogendranath Srimony*[1]. It is not the petitioner's case that he wrote to the Court and he was asked by the Court not to take out a license. Nor did the Court tell him at any time that he can keep the market without a license. If in respect of the act done by him under the orders of the Court he is prosecuted there will be some justification for considering the question whether it would be proper to prosecute him without first intimating

1. (1912) 15 I.C. 491.

to the Court under whose orders he was acting. If the law required any person having a private market to take out a license and if the receiver in respect of the property which formed part of the estate vesting in him had to take out a license it was his duty as receiver appointed by the Court to take out a license; and his proper course would be to take a license or take the orders of the Court. When he had not taken any such orders I am not able to see how it could be said that the prosecution is improper by reason of the fact that the sanction of the Court which appointed him receiver had not been obtained. The case reported in *Santokchand* v. *Emperor*[1] relied on for the petitioner has no application to the facts of this case. In that case the receiver appointed by the High Court took possession of certain bales and he was prosecuted for criminal breach of trust. He took those bales into his custody under the orders of the Court. The question for consideration was whether the Court under whose instruction he took the property in dispute should be asked to consider the question whether he should be prosecuted or not before a prosecution is launched. As a matter of fact this case was referred to by the Calcutta High Court in *Janendranath Pramanik* v. *Nilmony De*[2], and it was pointed out that the learned Judges who decided *Santokchand* v. *Emperor*[1] did not go so far as to deny jurisdiction to criminal Courts, and that all that was pointed out was about the impropriety of the complaint rather than about the lack of jurisdiction of the Court. In *Kimchand* v. *Devkaran Mulji*[3], it was held that sanction of the Court is not necessary to prosecute a receiver appointed by the High Court for an offence committed by him. In this case if under law a license has to be taken for the continuance of the market like the one in question the failure on the part of the receiver to take out a license is an act that was in excess of the powers of the receiver. Hence no sanction is necessary and the petition is accordingly dismissed.

B.V.V. ——— *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KUNHI RAMAN.

*In the matter of* A Pleader, Palni.*

*Legal Practitioners' Act (XVIII of* 1879), *section* 32, *and rules under the Act—Rule* 11—*Pleader appearing without obtaining renewal of sanad—Whether liable to disciplinary action.*

Where a pleader appeared before a Court without obtaining a renewal of his sanad and had not complied with rule 11 of the rules framed under the Legal Practitioners' Act and thereby rendered himself liable to be dealt with under section 32 of the Act,

*Held,* that as the pleader had not complied with rule 11, he had no right to appear in a case until his sanad had actually been renewed and his conduct in so appearing rendered him liable to punishment.

Whereas a notice was issued under sections 13 to 15 and 35 of the Legal Practitioners' Act to the Pleader, Palni, calling upon him to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court in that, he, the Pleader, had appeared in the Court of the Sub-Magistrate, Palni, on 15th January, 1943, and put in a memorandum of appearance in C. C. No. 28 of 1943 on his file together with a statement of objection without a sanad for 1943 in contravention of section 10 of the Legal Practitioners' Act and thereby had rendered himself liable to be dealt with under section 32 of the said Act, and whereas the High Court had directed the Sub-Magistrate, Palni, to start proceedings against him under section 32 of the Legal Practitioners' Act, and whereas the Sub-Magistrate, Palni, who started the proceedings, had, by his order, dated 25th October, 1943, in M.C. No. 23 of 1943,

1. (1918) I.L.R. 46 Cal. 432.
2. I.L.R. (1939) 1 Cal. 587.
3. (1928) I.L.R. 52 Bom. 898.

*R. C. No. 52 of 1943. 17th January, 1944.

dropped the said proceedings, and whereas the said order is subject to revision by the High Court under section 35 of the Legal Practitioners' Act:

The Advocate-General (*Sir Alladi Krishnaswami Aiyar*) in support of the Notice.

*K. S. Ramamurthy* for the Pleader.

The Judgment of the Court was delivered by

*The Chief Justice.*—The respondent is a pleader practising at Palni. Rule 11 of the rules framed under the Legal Practitioners' Act requires that an application for renewal of a certificate must be made through the Judge presiding over the Court in which the pleader ordinarily practises and unless the High Court or the Registrar otherwise orders should be made not later than the 15th November. If the application for renewal is made by that date the practice has been to allow the pleader to appear in cases pending the issue to him of the sanad. In this case the respondent did not apply for the renewal of his sanad in respect of the year 1943, until the 31st December, 1942, and on the 15th January, 1943, before the sanad had been renewed, he filed a memorandum of appearance in a case before the Sub-Magistrate of Palni. The certificate was subsequently issued and in accordance with the practice, was dated the 1st January, 1943.

As the pleader had not complied with rule 11 he had no right to appear in a case until his sanad had actually been renewed and in these circumstances this Court, directed that proceedings be instituted against the respondent. In accordance with this order the Sub-Magistrate instituted proceedings and after he had heard what the pleader had to say, directed the matter to be dropped. His reason for adopting this course was that he was under the impression that the High Court had condoned the delay on the part of the pleader in applying for the renewal of his sanad. This was not the case. It is obvious that in appearing on the 15th January, 1943, in the case before the Sub-Magistrate, he rendered himself liable to punishment under section 32 of the Legal Practitioners' Act. The respondent is a pleader of 27 years standing and his conduct hitherto has given no cause for complaint. An apology has been made on his behalf and in these circumstances we will not inflict a fine. The respondent is, however, censured for his conduct.

K.C. *Respondent censured.*

## [FULL BENCH.]

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KUNHI RAMAN.

*In the matter of* An Advocate, Ellore*

*Advocate—Charges—Inquiry by District Judge—Omission to frame a charge—Invalidity of report—Indian Bar Councils Act (XXXVIII of 1926), section 10.*

It is obligatory on the part of the Tribunal or Court in cases referred to them for inquiry under the Bar Councils Act to frame a formal charge.

Where a District Judge failed to frame a charge in an inquiry into the conduct of an advocate, *Held*, that the proceedings were vitiated by the omission.

The Advocate-General (*Sir Alladi Krishnaswami Aiyar*) in support of the Notice.

*K. Rajah Aiyar* and *V. Viyanna* for the Advocate.

The Order of the Court was made by

*The Chief Justice.*—On the 20th March, 1943, this Court acting under section 10 (2) of the Indian Bar Councils Act directed the District Judge of West Godavari to hold an inquiry into a complaint made against the respondent, who is an advocate practising at Ellore. Rule 1 of the rules relating to the procedure to be followed by Tribunals and District Courts in cases referred to them for inquiry under the Act, states that upon receipt of a case referred for inquiry under section 10 (2), the Tribunal or District Court shall forthwith frame a charge or

* Ref. Case No. 48 of 1943. 13th December, 1943.

charges on the basis of the complaint, fix a date, hour and place for the inquiry and give notice thereof to the complainant and to the advocate whose conduct is the subject of inquiry, at least 21 days before the date of inquiry and may call upon the complainant to file a list of witnesses and documents relied upon by him. In exceptional cases, the Tribunal or Court may, in its discretion, postpone the framing of charge or charges until after the examination and cross-examination of the witnesses for the complainant. Rule 2 requires the charge or charges to be read to the respondent. Therefore it is obligatory on the part of the Tribunal or Court to frame a formal charge.

In this case, the District Judge did not frame a charge. The complaint was one of misappropriation of client's money. The District Judge has presented a report which is in one respect adverse to the respondent. The failure on the part of the District Judge to frame a charge has vitiated the whole of the proceedings. It is a very regrettable omission on his part. The result is the waste of time and money.

In the circumstances the only course open to the Court is to direct that a further inquiry shall be held after a charge has been framed. The fresh inquiry must be held by another District Judge and we direct the District Judge of East Godavari to hold it after taking all the steps required by the rules.

V.P.S. ——— *Fresh inquiry ordered.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

T. Syed Fakruddin Saib and others .. *Appellants**

*v.*

Katta Ramayya Setti and others .. *Respondents.*

*Transfer of Property Act (IV of 1882), section 41—Transfer by ostensible owner—Transferee when protected —Real owner asserting rights in criminal proceedings—Subsequent transfer—Validity.*

Where an ostensible owner who is in possession of immovable property with the consent of the real owner, transfers the property and the transferee takes the transfer, honestly believing that the transferor had the power to make the transfer, the transferee will be protected under section 41 of the Transfer of Property Act. And the mere fact that the real owner had prior to the transfer unsuccessfully attempted to assert his exclusive rights to the property in certain criminal proceedings will not affect the possession of the ostensible owner or invalidate the transfer effected by him.

Appeal against the decree of the District Court of Anantapur in A. S. No. 162 of 1941 preferred against the decree of the Court of the District Munsiff of Anantapur in O. S. No. 19 of 1940.

*V. S. Narasimhachar* for Appellants.

*Kasturi Seshagiri Rao* and *V. Govindarajachari* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal raises an important question on the construction to be placed on the wording of section 41 of the Transfer of Property Act. The facts that led to this appeal are these.

The appellants are defendants 8 to 11, 13 and 14 who are the sons and daughters of one Ahmed Sahib. Respondents 1 to 5 are the representatives of Katta Subbayya the plaintiff in the suit. The other respondents are the heirs of one Bhandigi Sahib. Ahmed Sahib and Bhandigi Sahib were brothers. Bhandigi Sahib was a police head constable and had retired from service and settled in his native village. The other brother Ahmed Sahib was in service as a Sub-Inspector of Police and it appears that he sent a large sum of money to his brother Bhandigi Sahib. With the money so sent by Ahmed Sahib, Bhandigi Sahib purchased properties in his own name. The plaintiff Katta Subbayya took a simple mortgage from Bhandigi Sahib (Ex. B) on the 6th August, 1928. This was in order to pay off a debt due to one Mr. M. G. Rameswara Rao who was a leading advocate of Anantapur and now dead. Later on the plaintiff obtained a usufructuary mortgage in discharge of the simple mortgage which he had obtained in 1928. Ex. A is the usufructuary mortgage deed

* S. A. No. 1579 of 1942. 24th November, 1943.

dated 12th September, 1930. In between the simple mortgage and the usufructuary mortgage, Ahmed Sahib filed a suit in the District Munsiff's Court of Anantapur to enforce his right to the property in suit on the ground that the property having been purchased with the funds advanced by him was really his own property and not that of Bhandigi Sahib. The plaint was returned to be presented to the proper Court as the value of the property exceeded the jurisdiction of the District Munsiff's Court, and thereupon it was presented to the higher Court. The order of returning the plaint to be presented to the proper Court was passed on the 24th September, 1930. Ex. A the usufructuary mortgage was thus effected at a time when the suit was pending in the District Munsiff's Court and a few days after the usufructuary mortgage, the order returning the plaint to the proper Court was passed. At the time when the simple mortgage was taken on the 6th August, 1928, the position was that Ahmed Sahib had unsuccessfully attempted to get possession of the properties in certain criminal proceedings. Those proceedings, however, were not effective and did not give Ahmed Sahib the relief that he wanted and it was for the reason that he failed to get relief in the criminal proceedings and also in certain other proceedings to be mentioned later that he filed the suit in the District Munsiff's Court on the 7th December, 1928. The simple mortgage was executed four months earlier by Bhandigi Sahib in favour of Katta Subbayya. The suit filed by Ahmed Sahib in the District Munsiff's Court which was later on re-presented in the higher Court ended ultimately in the title of Ahmed Sahib being established as against Bhandigi Sahib.

On these facts the question is whether the plaintiff is protected by section 41 of the Transfer of Property Act. In this suit, the plaintiff did not challenge the title of Ahmed Sahib. He was apparently content to proceed upon the judgment of the High Court that Ahmed Sahib was the real owner of the property. He (the plaintiff) mainly rested his case on the fact that Bhandigi Sahib was an ostensible owner in possession of the property with the consent express or implied of the real owner Ahmed Sahib and that he (the plaintiff) took the transfer (first the simple mortgage and later the usufructuary mortgage) after taking reasonable care to ascertain that the transferor had power to make the transfer and acted in good faith. The contesting defendants are 8 to 11, 13 and 14 who are sons and daughters of Ahmed Sahib. They contend that the plaintiff is a resident of the same street as Ahmed Sahib and Bhandigi Sahib, that he knew all the litigations between Ahmed Sahib and Bhandigi Sahib and that therefore he had notice of the claim of Ahmed Sahib as against Bhandigi Sahib. It was also said that the plaintiff did not take any steps to ascertain that the transferor had the power to make the transfer and that he did not act in good faith. The trial Court held against the plaintiff and dismissed the suit. On appeal the District Judge held that the plaintiff advanced the money in order to discharge the debt due to Mr. Rameswara Rao, a leading advocate of Anantapur and that therefore the provisions of section 41 as to good faith and reasonable care to ascertain that the transferor had power to create the mortgage were fulfilled. The appellate Judge also held that on the facts of this case, there was no room to doubt that Bhandigi Sahib was in possession as the ostensible owner with the consent express or implied of the real owner. He stated thus :

"As appears clearly from the record, Ahmed Sahib has been sending money to his family and getting properties purchased and not showing them in his own name with the purpose of avoiding mention of them in his landed property statement to Government, so that if large properties are shown in the property list, suspicion might not be raised that he had been able to purchase them by ill-gotten gains."

The word "not" seems to be incorrect.

It is contended by Mr. Narasimhachar, the learned advocate for the appellants, that there is no finding in terms of section 41 that Bhandigi Sahib was the ostensible owner with the consent express or implied of the real owner. But the passage just now extracted shows clearly that on the facts of this case, it could not possibly be disputed that Bhandigi Sahib was in possession with the consent of Ahmed Sahib. In fact Ahmed Sahib asked Bhandigi Sahib to avoid purchasing the properties in the name of Ahmed Sahib. Ahmed Sahib was only a Sub-Inspector of Police and he could not have got all the money that he sent to Bhandigi Sahib as savings from

his own salary. He must have got them by other means as pointed out in the appellate judgment and he must have asked Bhandigi Sahib to purchase the lands in his own name and avoid purchasing in the name of Ahmed Sahib. Thus, the first part of section 41 is fully satisfied.

As regards the next question it is said that there is no finding that Katta Subbayya made any enquiries or that he acted in good faith when he advanced the money on the simple mortgage or when he took the usufructuary mortgage. It was further urged that the plaintiff did not even go into the witness-box and speak to the enquiries that he made. The plaintiff is an old man of over seventy on the date of the plaint and his son, P. W. 4 went into the witness-box and spoke to the relevant facts. When a person in the position of Katta Subbayya was asked to advance money to Bhandigi Sahib in order to discharge a debt due to Mr. Rameswara Rao and when the properties stood in the name of Bhandigi Sahib, there was no need to make any further enquiry. The properties were originally in the name of one Hanumanthachar. Hanumanthachar sold the property direct in the name of Bhandigi Sahib. Bhandigi Sahib executed a mortgage in favour of Mr. Rameswara Rao. In these circumstances, if a person in the position of Katta Subbayya honestly believed that Bhandigi Sahib had the power to make the transfer, it cannot be said that there was anything unreasonable in his attitude or that he did not act in good faith. There is, therefore, no reason to differ from the District Judge and hold that these conditions also are not satisfied.

The further point is whether the fact that Ahmed Sahib asserted his title in certain criminal proceedings as against Bhandigi Sahib excludes operation of section 41. The learned advocate for the appellants urges that the condition that the ostensible owner should have been in possession of the immovable property with the consent express or implied of the real owner must be satisfied on the date of the transfer. It is urged that if the real owner had asserted his exclusive right in proceedings in a Civil Court or in criminal proceedings, it could not thereafter be said that the ostensible owner was in possession with his consent express or implied. The argument is that even if he had given his consent to another person being in possession as an ostensible owner, he had withdrawn it on the date when he asserted that the ostensible owner should not be in possession any longer. Reliance was placed on a decision of the Allahabad Court in *Fazal Hussain* v. *Mohamed Kazim*[1] as also on an earlier decision of that Court in *Shafiq Ullah Khan* v. *Sami Ullah Khan*[2]. In the earlier decision the learned Judges held that the alienation itself must have been consented to by the real owner. That, however, is not a condition laid down under section 41 of the Transfer of Property Act. If the actual alienation which is attacked later on had been consented to by the real owner, then it would be a clear case of estoppel under section 115 of the Indian Evidence Act as was pointed out by the learned Judges who decided the later case in *Fazal Hussain* v. *Mohamed Kazim*[1]. Coming to the later decision, it was a case where reasonable enquiries had not been made by the alienee from the ostensible owner. On that ground the alienee was non-suited as he had been in the lower Court. In dealing with the argument based upon the earlier decision, the learned Judges made an observation that the consent of the true owner to the possession of the ostensible owner must continue to the date of the transfer. Mr. Seshagiri Rao, the learned advocate for the respondents, urges that the observations in *Fazal Hussain* v. *Mohamed Kazim*[1] are really *obiter*, because ultimately the decision was rested on the ground that the alienee did not make any reasonable enquiry and that therefore the latter part of section 41 was not satisfied. This appears to be so. Going back to the earlier decision in *Shafiq Ullah Khan* v. *Sami Ullah Khan*[2], it appears that the real owner commenced a suit to establish his title to the property and that the defendants in whom the apparent title stood, alienated the property to a third party. Thus it is a clear case of *lis pendens*. No doubt there are observations in *Shafiq Ullah Khan* v. *Sami Ullah Khan*[2] to the effect that the consent of the real owner must subsist on the date of the transfer and that the actual alienation must have been consented to by

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1. (1933) I.L.R. 56 All. 582.
2. (1929) I.L.R. 52 All. 139.

the real owner. Here again, I must accede to the contention of Mr. Seshagiri Rao that the observations in this case were really *obiter*. Mr. Narasimhachar for the appellants urges that the wording of section 41 shows that the consent express or implied of the real owner must subsist when the transfer takes place.

My attention has been drawn to the decision of Mookerjea and Cuming, JJ., of the Calcutta High Court in *Baidyanath Dutt* v. *Alof Jan Bibi*[1]. There one Karimannessa who was the real owner of the property made a transfer in the names of her two grand-daughters Asia and Sofia. Sofia was a minor and Asia made an application under the Guardians and Wards Act and got herself appointed as the guardian. Later on she applied for permission to sell a portion of the property on behalf of Sofia. In those proceedings the grandmother repudiated the gift made by her and urged that the sanction applied for should not be granted. But her opposition was not upheld and the permission sought was granted. Then an alienation was made and the question arose whether the alienation was protected by the terms of section 41 of the Transfer of Property Act. It was held that it was. On page 199 the learned Judges say this, after referring to the various documents which showed that the apparent title was in the alienors :

"The chain of title was thus complete. The factum of possession also was in accord with the title. Abdul Kader was in possession of the house. His wife, mother-in-law and grand-mother-in-law no doubt lived in the house, but they would be there as members of the family. The records in the Collectorate would show that the name of Karimannessa had been expunged and replaced by the names of Asia and Sofia ; later on, these names had been replaced by that of Manatunbi who held the redemption certificate. If the intending mortgagee could discover that Karimannessa had fruitlessly objected to the grant of permission by the District Judge to Asia to sell or mortgage the interest of her sister, the fact was undeniable that she had taken no further steps during a period of ten years. Again if the intending mortgagee could discover that Karimannessa had deposed in favour of the tenant in the suit by Manatunbi, the fact remained that her opposition was as abortive in 1909 as it had been in 1900."

Under those circumstances the title of the mortgagee was upheld. In that case there was clear repudiation of the ostensible owner's right. If repudiation by the real owner precludes the applicability of section 41 of the Transfer of Property Act, the decision must have been otherwise. But the learned Judges do not seem to have regarded that repudiation as in any way affecting the applicability of section 41 and they held that section 41 applied to that case. In the case before us Ahmed Sahib did not succeed in the criminal proceedings. It is not necessary for us to enquire into the reason for his failure. If after he failed and before he filed the suit in the District Munsiff's Court for establishing his title, Bhandigi Sahib effected the mortgage in favour of Mr. G. Rameswara Rao who evidently advanced monies in the belief that he (Bhandigi Sahib) had the right to effect the mortgage and if later on the plaintiff advances a sum of money in order to discharge Mr. Rameswara Rao's mortgage, I think the case is governed really by the decision of Mookerjea and Cuming, JJ., in the decision just referred to. There is also a decision of a single Judge in *M. P. A. K. Firm* v. *Ma Mya Thein*[2] in which also the same principle is laid down. As in the Calcutta case there were proceedings by the real owner against the ostensible owner in which the real owner asserted his title. One Daw Shwe Hme who was the original owner executed a registered deed of gift in favour of respondents 2, 3 and 4 in the appeal. There was a mortgage by respondents 2, 3 and 4 in whose favour there was the transfer by the original owner. It would appear that before the date of this mortgage by the ostensible owners a suit had been filed on the 18th December, 1936, in which the first respondent had asserted his exclusive title to the properties and also prayed for the cancellation of the deed of gift whereby Daw Shwe Hme had transferred the lands in suit to respondents 2, 3 and 4. It was no doubt true that later on there was an amendment of the plaint in which this relief was omitted. The learned Judge points out that there was nothing to show that the alienees from the ostensible owners had knowledge of the litigation between the real owner and the ostensible owner, and that if they had knowledge of that litigation they would also have known that the attempt on the part of the real owner to assert his right to the property proved fruitless. In the

1. (1922) 70 I.C. 194. 2. A.I.R. 1940 Rang. 184.

present case the attempt on the part of the real owner did not succeed in the criminal proceedings. It appears that there were some arbitration proceedings and an award. But there again Ahmed Sahib does not appear to have succeeded, because notwithstanding the award, he was obliged to file a suit on 7th December, 1928, asking the Court to establish his exclusive right to the properties in question. My attention has been also drawn to a decision of the Calcutta High Court in *Chapalabala* v. *Sarat Kumari*[1] where after the death of the real owner, the property was transferred by the ostensible owner to a third party and it was held that the death of the real owner did not preclude the applicability of section 41 of the Transfer of Property Act. The argument is that if the title of the alienee from the ostensible owner is rested on the substance of the real owner's consent express or implied on the date of the transfer, the death of the real owner would put an end to the express or implied consent and that thereafter the ostensible owner would have no right to give a better title than what he had to an alienee from him. It was nevertheless held that the alienee could invoke the protection given under section 41 of the Transfer of Property Act.

In the result, the second appeal fails and it is dismissed with costs. No leave.

B.V.V. —— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT AND MR. JUSTICE KUNHI RAMAN.

Rajah Inuganti Rajagopala Venkata Narasimha Rayanimgar .. *Appellant**

*v.*

R. D. K. Venkatalingama Nayanim Bahadur Varu and others .. *Respondents.*

*Execution—Property in possession of receiver—Leave of Court—Failure to obtain—Sale voidable and not void—Applicability of rule to mortgagee decree-holder—Court appointing receiver and executing Court being same—No implied grant of leave.*

Where property in the possession of a receiver is sold in execution without obtaining leave of the Court, the sale is not void but is only voidable at the discretion of the Court. And where leave of the Court is obtained subsequently the illegality is effectively cured and the sale is not liable to be set aside.

Kerr on Receivers, 10th edition, p. 192; *Mrs. Lavina Ashton* v. *Madhabmoni Dasi,* (1911) 14 C.W.N. 560 : 11 C.L.J. 489 ; *Manghlal* v. *Daya Shankar,* A.I.R. 1936 Pat. 572 ; *Amma Kutty* v. *Manavikraman,* (1920) I.L.R. 43 Mad. 793 and *Fraser and Ross* v. *Krishnaswami Iyer,* (1922) 43 M.L.J. 211 : I.L.R. 47 Mad. 47, referred to.

The principle that leave of the Court should be obtained before property in the hands of a receiver is proceeded against in execution is equally applicable to a case where the execution is levied by a mortgagee-decree-holder. And the mere fact that the executing Court and the Court appointing the receiver were the same will not necessarily lead to the inference that leave may be taken to have been granted by the Court.

*Somasundaram Chettiar* v. *Parimala Kandar,* (1935) 42 L.W. 590, considered.

Appeals against the orders of the Court of the Subordinate Judge of Chittoor, dated 17th August, 1942, in E. A. No. 385 of 1939 and E.A. No. 100 of 1940 in E. P. No. 20 of 1930 in O. S. No. 86 of 1916, respectively, etc.

*P. V. Rajamannar* and *K. Subba Rao* for Appellant.

*A. Bhujanga Rao, M. S. Ramachandra Rao, D. R. Krishna Rao, R. Ramamurthi* and *P. S. Raghavarama Sastri* for Respondents.

The Judgment of the Court was delivered by

*Mockett, J.*—We will deal with these appeals in a common judgment, separating them however as convenient.

*A.A.O. Nos.* 411 *and* 412 *of* 1942.—The appellant is the decree-holder and the respondent is the judgment-debtor, the 24th defendant in O. S. No. 86 of 1916, Sub-Judge's Court, Chittoor, which was a suit by a junior member of the Kalahasti zamindari for maintenance against the 24th defendant. On the 6th of June, 1918, there was a preliminary decree for Rs. 42,658-15-6 which was charged on the whole of the zamindari. In this appeal we are concerned with the sale of Peddakanali

1. A.I.R. 1941 Cal. 318.

* A. A. O. Nos. 411, 412, 484, 493 and 494 of 1942. 23rd November, 1943.

village, part of the zamindari. On the 23rd of November, 1920, the final decree was passed. Appeals Nos. 58, 69 and 70 of 1919 were filed by various defendants against the preliminary decree. These appeals were dismissed on the 3rd May, 1927. E. P. No. 20 of 1930 was filed on the 15th of January, 1930 and an order for sale of Peddakanali village was made on the 28th of March, 1935. On the 17th March, 1934, one Srinivasa Ayyah was appointed receiver in a suit, O. S. No. 881 of 1914, which had been filed by one Simhachellam. Srinivasa Ayyah was discharged in February 1936, and in the same month Simhachellam himself was appointed receiver. The sale proclamation regarding Peddakanali village was dated 30th September, 1936. On the 22nd of January, 1937, Simhachellam filed petitions for stopping the sale on the ground that he had been appointed receiver. This was dismissed on the 1st March, 1937. The sale was fixed for the 26th January and on the 21st January, 1938 (Ex. D-20), the District Judge of Chittoor granted leave to proceed against Peddakanali village provided it was found to be subject to a charge by the executing Court. Simhachellam was discharged from his receivership in November, 1938 and on the 19th July, 1939, in O. S. No. 105 of 1925 one Srinivasalu Chetty was appointed receiver by the District Court, Chittoor. The sale of Peddakanali village was actually held on the 30th September, 1939.

It is well to refer to some other litigation relating to this village. E. A. No. 385 of 1939 was filed before the Subordinate Judge of Chittoor for setting aside the sale dated 30th September, 1939. On the 27th October, 1939, the present respondent made this application and the learned Judge ordered him to furnish security and on his failure to do so, the Court dismissed his application to set aside the sale. There was an appeal, A. A. O. No. 411 of 1940, before King and Happell, JJ. The learned Judges on December 18, 1941, agreed with the lower Court's conclusion, but noticed that the appellant took the point that the sale was void in that it had been effected without the previous sanction of the District Judge of Chittoor which it was contended was necessary because the receiver Srinivasalu Chetti was then in possession. The learned Judges set aside the orders of the lower Court and remanded the petition for disposal on this point. An application dated 4th March, 1941, was made to the District Judge of Chittoor, E. A. No. 10 of 1941 in E. P. No. 6 of 1939 in O. S. No. 105 of 1925 to validate the sale of the village which had taken place on the 30th September, 1939. The learned District Judge on the 6th August, 1941, passed the following order :

> "I have already passed orders on a similar petition. Peddakanali has been sold in execution. It was in possession of a receiver of this Court in execution of a decree, and this Court permitted it to be sold. But when it was actually sold that receiver had been discharged and another receiver was in possession in execution of another decree. I will not express any opinion on the question whether sale is valid or invalid on that account. That is a question for the Sub-Court to decide.
>
> I would only say that this Court has absolutely no objection to the sale of this village and must not be considered responsible for any tactics of its receiver. I do not consider that there has been any contempt of Court in this case at all."

This order does not appear to have been brought to the notice of King and Happell, JJ. We read this order as implying that the learned Judge intended to say that he did not approve of the tactics of the receiver and that, had leave been asked for, he would have granted it. We understand this to mean that he gave retrospective leave, if such a thing was possible, but that in any case he would not have set aside the sale unless bound by law to do so on the ground that it was void *ab initio*. Whether it was void, he left to the executing Court to decide, which, in fact, it was later, as we know, again directed to do by the order of King and Happell, JJ. The executing Court has held that as the sale was without permission, it was invalid, by which we understand it to mean void, and that an invalid sale could not be validated by obtaining subsequent permission. We propose to say only this about the lower Court's judgment, the learned Judge refused to draw what he described as "nice distinctions," between the words "void" and "voidable," which of course is the very essence of the decision ; yet in the conclusion of his judgment he states that it was clear that the "decree-holder was really aware of the law that an execution sale can be cancelled by the executing Court if it had been held without the previous sanction of the Court."

It has been argued before us that the sale of the 30th September, 1939, is void because at the time of the sale Srinivasalu Chetti was the receiver in O. S. No. 105 of 1925 and the leave of the Court in that suit had not been obtained and it is contended that the leave could not be given retrospectively and that for these reasons the sale is void and is of no effect. For the appellant it has been argued that the sale is not void but can be set aside at the discretion of the Court and that it is obvious that the learned District Judge intended to give the necessary leave and that this Court, now that the matter is before it, should not set it aside and that in the absence of its being set aside it should be treated as a valid sale. We may state at once that there is nothing in the circumstances of this case which suggest that any injustice has been done. The receiver was the respondent's own manager and must have been perfectly well aware of everything that was going on.

The short point before us, therefore, is whether a sale of property in the possession of a receiver is void or voidable. If it is void, it must be set aside ; if it is voidable, that is, it can be set aside if the Court thinks fit, we will unhesitatingly refuse to do so and it will be treated as valid.

The authorities seem to us to be entirely in favour of the appellant. The law is succinctly stated in Kerr on "Receivers," 10th edition, page 192, etc. One extract is enough,

> "When the Court has appointed a receiver and the receiver is in possession, his possession is the possession of the Court, and may not be disturbed without its leave. If anyone, whoever he be, disturb the possession of the receiver, the Court holds that person guilty of a contempt of Court and liable to be imprisoned for the contempt . . . . But unless the receiver comes with clean hands he will not be granted an injunction to restrain any interference with him, for instance, by distress . . . . ."

An instance where the Court refused to interfere is to be found in *Jarvis* v. *Islington Borough Council*[1]. In that case although execution was being levied, Warrington, J., refused to assist the receiver whatever the technical aspect of the matter might be. The learned Judge points out that relief by injunction was an equitable relief. It is well to bear in mind that the jurisdiction of the Court over a receiver is not fettered by statute. Order 40, rule 1 empowers a Court to appoint a receiver and to control his actions. There is nothing in the order which restricts the Court's control in any particular manner. This is naturally so. A receiver is an officer representing the Court, his possession is the Court's possession, and it follows that a very wide discretion must be in the Court as to how it should deal with its own affairs. The decisions relating to suits and proceedings against an Official Assignee which depend upon the provisions of a statute (section 17 of the Presidency Towns Insolvency Act) have no relation to a receiver.

It was argued by the learned counsel for the respondent that authority for the proposition that a sale in execution of property of which a receiver was in possession was void is to be found in the decision of the Calcutta High Court in *Mrs. Lavina Ashton* v. *Madhabmoni Dasi*[2]. It appears to have been argued before the learned Judges that although execution against property in the custody of a receiver might amount to contempt, it did not necessarily affect the sale, a proposition which was negatived. "The general rule", says Mookerjee, J., "is well settled that property in the hands of a receiver is exempt from judicial process, except of course to the extent permitted by the appointing Court." It is only necessary to observe that in this judgment the learned Judges throughout recognise that such a sale is liable to be set aside, which, as they point out, is the trend of the English and American cases, and nowhere in this decision is it stated that such a sale is void. Another argument in favour of that view has been founded on the use of the word "illegal" in the judgment. We consider that the word is used by the learned Judge in a general sense—certainly not as meaning "void." Later decisions of the Calcutta High Court point out that the Calcutta view is that a sale of property in the possession of a receiver is voidable and not void, *Karimunnissa Khatum* v. *Fazlul Kasim*[3]. In *Kanalal* v. *Hanoo Bibi*[4], Mookerjee and Beachcroft, JJ., observe :

1. 73 Justice of the Peace N.C. 323.
2. (1910) 14 C.W.N. 560 : 11 C.L.J. 489.
3. A.I.R. 1924 Cal. 1055.
4. A.I.R. 1919 Cal. 269 at 270.

"As pointed out in *Mrs. Lavina Ashton* v. *Madhabmoni Dasi*[1], property in the hands of a receiver is exempt from judicial process and the purchaser of such property at an execution sale buys at his peril for the sale may be cancelled upon an application to the execution Court."

In other words, when property is in the custody of a receiver appointed by a Court, the sale under an execution issued by another Court may be avoided by appropriate procedure. It must be remembered in this case that execution was levied by the Subordinate Judge's Court of Chittoor in a case in which a receiver had been appointed by the District Judge. In *Mangtulal* v. *Daya Shanker*,[2] where the Calcutta cases are discussed, Mahamad Noor and Rowland, JJ., state that a sale "in execution of a decree of a property in the custody of a receiver without the leave of the Court which appointed him is not void but it can be set aside in a proper proceeding." In *Thayumana Pillai* v. *Ramaswami Chettiar*[3], Krishnan and Odgers, JJ., approve the statement of Mookerjee, J., in *Mrs. Lavina Ashton* v. *Madhabmoni Dasi*[1] that a purchaser in Court auction, without previous leave to sell, buys at his peril; for the sale may be cancelled. In a recent decision of the Madras High Court in *Subramania Iyer* v. *Thandavamurthi Chetti*[4], Leach, C.J. and Byers, J., consider the Calcutta cases and the decision of the Madras High Court in *Fraser and Ross* v. *Krishnaswami Iyer*[5]. The learned Judges observe regarding the Calcutta cases:

"In the first of these cases *Mrs. Lavina Ashton* v. *Madhabmoni Dasi*[1], the Calcutta High Court held that the sale of a foreclosure decree without the leave of the Court while the estate was in the possession of a receiver was illegal and liable to be avoided. That case is no authority for the proposition that the decree of the City Civil Court passed in favour of the appellant is a nullity. Whether it could be set aside at the instance of the Official Trustee as such or the receiver is, of course, another matter."

The decree in question created a charge on property in the hands of a receiver. It would seem therefore that so far from there being any authority for the view that a sale of property in the hands of a receiver without leave of the Court is void, there is ample authority for the proposition that it is not void but is liable to be set aside, that is to say, is voidable. The sale therefore in the case before us was in the later category. The question is, should it now be set aside?

We have held that in our view the District Judge of Chittoor with the facts before him gave retrospective leave. We are unaware of any provision of law or statute that restricts discretion of a Court with regard to its control of the property in *custodia legis*. There is, however, a direct authority of this High Court that where a suit is instituted against the receiver appointed by a Court, without obtaining the previous sanction of that Court, the omission to obtain such sanction does not affect the jurisdiction of the Court in which the suit is laid but is an illegality which can be effectively cured by the plaintiff obtaining the sanction during the course of the litigation. This means of course that after the suit has been filed, retrospective leave can be given—*Ammu Kutty* v. *Manavikrama*[6], Sadasiva Aiyar and Spencer, JJ. The learned Judges observe, approving the view of High, Woodroffe and Kerr, the authors of text books on the subject:

". . . . . The omission to obtain previous sanction (a sanction which is not a condition imposed by statutory law like the sanction mentioned in section 92, Civil Procedure Code, or section 17 of the Presidency Towns Insolvency Act, but one imposed by the common law to enforce due respect towards Courts of Justice) does not affect the jurisdiction of the Court, but is an illegality which can be effectively cured by the plaintiff obtaining the sanction during the course of the litigation."

We see no reason to suppose that the principle laid down in this case does not apply to the case before us. The facts are, leave to sell this property had been granted during the office of the previous receiver and the receiver was replaced after a short interval by another receiver but a second leave was not obtained. The appointing Court expressed the opinion that it had no objection whatever to the sale. Holding that that was tantamount to retrospective leave, and in the absence of any law restricting the discretion of the Court in these matters, we consider that this sale must stand. The decision of the Court below was based, as we have indicated, purely on the ground that the sale was void, with which view we have intimated

1. (1910) 14 C.W. N. 560 : 11 C.L.J. 489 at 494.
2. A.I.R. 1936 Pat. 572 at 576.
3. (1923) 19 L.W. 681.
4. (1942) 2 M.L.J. 115 : I.L.R. (1942) Mad. 953.
5. (1922) 43 M.L.J. 211 : I.L.R. 47 Mad. 47.
6. (1920) I.L.R. 43 Mad. 793.

we are in disagreement. No grounds appear why for the ends of justice it should be set aside.

For the foregoing reasons we therefore allow these appeals with costs.

*A. A. O. No.* 484 *of* 1942.—The history of the litigation in this matter has been set out in our judgment in A. A. O. Nos. 411 and 412 of 1942. The facts in this case are as follows : In O.S. No. 36 of 1922, Subordinate Judge's Court, Chittoor, the appellant sued for maintenance and there was a charge *inter alia* on the village of Vagavedu. The preliminary decree was dated the 4th April, 1934, and the final decree, the 27th November, 1936. In E. P. No. 110 of 1937 on the 13th July, 1940, the village was sold and was purchased by the decree-holder but without notice to a receiver who had been appointed in a suit O. S. No. 17 of 1910 by a third party in which a decree had been passed against the defendant for maintenance and in that suit the defendant's agent was appointed (E. P. No. 5 of 1929) as receiver by the Subordinate Judge of Chittoor. E. A. No. 289 of 1940 was filed by the judgment-debtor to set aside the sale. It was argued that no leave of the Court appointing the receiver had been asked nor granted. That would appear to be so. It was argued however that as the executing Court and the Court appointing the receiver were the same, we should hold that leave must be taken to have been granted by the Court and that the decision of this High Court in *Somasundaram Chettiar* v. *Parimala Kandar*[1] (Beasley, C.J. and Cornish, J.) was in point. But in that case the learned Judges held that the executing Court besides being the very Court, which had appointed the receiver, was fully aware of the appointment of the receiver, that it had allowed the sale to go on with knowledge of the existence of the receiver, and the receiver was fully aware of the sale. These latter circumstances are not present in the appeal before us now. This receiver had been appointed in 1929 and the sale was in 1940. The personnel of the Court must have changed frequently. We do not think it can be held, as was clearly in the mind of the learned Judges who decided *Somasundaram Chettiar* v. *Parimala Kandar*[1], to which we have just referred, that in this case the Court must have impliedly given leave with full knowledge of the facts. Had it appeared that the Court had been informed of the facts, we might have taken another view.

It has, however, also been argued that the mortgagee decree-holder need not obtain the leave of the Court. Devadoss, J., in *Fraser and Ross* v. *Krishnaswami Iyer*[2] dissenting from the decision of Sale, J., in *Jogendranath Gossain* v. *Debendranath Gossain*[3] thought that the ordinary principles governing the possession of a receiver apply. He observed :

> " The property being in *custodia legis* it would require very strong authority for holding that a mortgagee could set at naught the ordinary principle which prevents process being issued against the property in the hands of the receiver, without the leave of the Court appointing him, simply because there is a mortgage in his favour."

We respectfully agree with Devadoss, J. Apart from the decision of Sale, J., there seems to be no authority for the proposition that a mortgagee is in a different position to that of other decree-holders. The observations of Leach, C.J. and Byers, J., in *Subramania Iyer* v. *Thandavamurthi Chetti*[4], to which we have referred in our connected judgment in A. A. O. Nos. 411 and 412 of 1942 are opposed to this proposition. The property is undoubtedly in *custodia legis* and in the absence of authority it would seem reasonable that the mortgagee should formally ask the permission of the Court which would no doubt after being satisfied as to his good faith grant permission. In the appeals before us now, the learned Subordinate Judge has set aside this sale on the ground that it was void. In this case, the Subordinate Judge's Court which appointed the receiver and the executing Court are the same. Whether this sale should be set aside on the merits has not been considered. We think that the proper course is to set aside the order of the lower Court and remand the case for disposal. The Court should consider whether the merits demand that this sale should be set aside and whether retrospective leave will be granted.

1. (1935) 42 L.W. 590.
2. (1922) 43 M.L.J. 211: I.L.R. 47 Mad. 47.
3. (1898) I.L.R. 26 Cal. 127.
4. (1942) 2 M.L.J. 115 : I.L.R. (1942) Mad. 953.

There will be no order with regard to costs in this appeal.

*A. A. O. Nos.* 494 and 493 *of* 1942.—These appeals concern the village of Sirasanambedu. Here too it is common ground that the sale was without the leave of the Court appointing the receiver and the judgment has entirely proceeded as in the other appeals which we have heard on the basis that this sale is either valid or null and void. We have pointed out in A. A. O. Nos. 411 and 412 that this view is incorrect and that *prima facie* the sale is valid but is liable to be set aside by reason of the absence of leave to sell from the Court appointing the receiver. The learned Judge set aside the sale solely on the ground that he considered that it was void by reason of the absence of such leave. We accordingly set aside his order and remand the case for re-hearing in the light of the observations which we have made in this judgment and in A. A. O. Nos. 411 and 412 of 1942. As the receiver was appointed by the District Judge, we think it convenient to transfer E.A. No. 29 of 1940 and E. A. No. 398 of 1940 in E. P. No. 110 of 1937 in O. S. No. 36 of 1922 and E. P. No. 110 of 1937 to the file of the District Judge, Chittoor. They will be decided by him on the merits, that is to say, it having been held that this sale is liable to be set aside, if the District Judge thinks fit, he will decide whether the ends of justice demand that it should be set aside for any reason.

We make no order for costs in these appeals.

B.V.V. *A. A. O. Nos.* 411 *and* 412 *af* 1942 *allowed.*
*A.A.O. Nos.* 484, 494 *and* 493 *of* 1942 *remanded.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Jalda Manikyala Rao .. *Appellant**

*v.*

Meerza Gulam Raza and others .. *Respondents.*

*Execution—Decreė against Mahomedan co-heirs—Death of one defendant pending execution—Legal representatives not impleaded—Effect of execution sale.*

A suit was filed for the recovery of a debt due by a deceased Mahomedan from his heirs and the claim was decreed against the defendants, their liability however being limited to the assets of the deceased in their hands. During the course of the execution proceedings one of the defendants died, but his legal representatives were not impleaded. Certain properties having been sold in execution, the legal representatives of the deceased defendant sued to set aside the sale.

*Held,* that the sale was not binding on the legal representatives of the deceased defendant, and that it could not be said that the surviving defendants represented the interests of the deceased's legal representatives.

*Held, further,* that the sale could not be avoided in its entirety and that it was binding on those defendants who were parties to the execution proceedings.

Appeal against and petition under section 115 of Act V of 1908 to revise the order of the District Court of Kistna at Chilakalapudi dated 17th September, 1942, and made in C. M. A. No. 18 of 1942, preferred against the order of the Court of the District Munsiff of Masulipatam dated 11th December, 1941 and made in C. M. P. No. 1677 of 1941 in O. S. No. 50 of 1926.

*Ch. Raghava Rao* for Appellant.

*B. Pocker* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant in the C. M. S. A. is the auction purchaser in the sale held in execution of the decree in O. S. No. 50 of 1926 on the file of the District Munsiff's Court of Masulipatam. He is also the petitioner in the connected C. R. P. and in both he disputes the correctness of the order of the learned District Judge of Kistna in C. M. A. No. 18 of 1942 setting aside the sale *in toto* in favour of the petitioner. The suit O. S. No. 50 of 1926 was filed by the third respondent, a creditor of one Raza Ali for recovery of money due to him. As Raza Ali was dead when the suit was filed the seven defendants were sued as his legal representatives and a decree was passed against them, their liability being limited to the assets of

* A. A. A. O. No. 9 of 1943 and C. R. P. No. 65 of 1943. 25th November, 1943.

Raza Ali in their hands if any. Respondents 1 and 2 attached the decree obtained by the third respondent in O. S. No. 50 of 1926 and brought to sale the properties which are the subject-matter of this appeal.

During the course of the execution proceedings, the seventh defendant in the suit died on 10th January, 1941. Evidently, the attaching creditors were not aware of it and the proceedings continued without the legal representatives being brought on record with the result that on the 14th July, 1941, the properties were sold without the legal representatives of the deceased seventh defendant on record. The petitioners claiming to be the legal representatives of the deceased seventh defendant filed the petition out of which the appeal and the revision petition arise, for setting aside the sale on the ground that the sale was not valid and binding on them.

The first Court dismissed the petition and the learned District Judge, on appeal, allowed the petition and set aside the sale. It was also contended that the property fetched a low price. The learned Judge found that the price was not adequate but set aside the sale on the ground that it was illegal and invalid as the executing Court had no jurisdiction to sell the property in the absence of the legal representatives of the seventh defendant.

So far as the legal representatives of the seventh defendant are concerned, it cannot be said that the sale could not be questioned. It was pointed out in *Kanchaimalai Pathar* v. *Shahaji Rajah Sahib*[1] by a Full Bench of this Court that when the legal representative of a judgment-debtor is not on record, the execution proceedings and the sale held in the same will be invalid. It is true in that case there was only one judgment-debtor while in this case there were several judgment-debtors. The decree was obtained not against the deceased Raza Ali but as against defendants 1 to 7 though their liability was limited to the extent of the assets in their hands. It is possible that execution of such a decree might be barred against some of them and could be executed against others. It cannot, in these circumstances, be said that one of the defendants could represent the interests of the other ; for they are Muhammadan co-heirs and one of them cannot be said to represent the interests of the other. On the death of Raza Ali, the estate vested in the seven legal representatives but they took as tenants in common.

A number of authorities were cited for the appellant for the position that where a decree is obtained against some of the legal representatives without impleading the rest, such a decree could be executed and the sale held in execution of such decree could be valid and binding on those persons who were not made parties. On the strength of those rulings it was stated that as in this case the other six defendants were parties to the execution proceedings, it must be considered that they sufficiently represented the heirs of the seventh defendant and consequently the sale could not be set aside.. The rulings cited for the appellant are *Khurshet Bibi* v. *Ladkavahu*[2], *Davalava* v. *Bhimaji Dhondo*[3] and *Ramanathan Chettiar* v. *Ramanathan Chettiar*[4]; but then *Khurshet Bibi* v. *Ladkavahu*[2] and *Davalava* v. *Bhimaji Dhondo*[3] are cases relating to Muhammadan heirs and the correctness of those decisions was doubted in a later ruling of that Court in *Bhagirathi* v. *Roshanbi*[5] and it was pointed out that those decisions were arrived at by applying the principle of the Hindu law of representation to Muhammadans which was not accepted by the Bombay High Court. *Ramanathan Chettiar* v. *Ramanathan Chettiar*[4] relates to a case of a joint Hindu family. In all these cases, the decision was based on the ground that the other persons sufficiently represented the interest of the person who was not brought on record and they were all considered to be cases in which a decree or relief was granted as against a particular estate. In this case, it is as against seven individuals the decree has been obtained and one cannot be said to represent the interest of the other. In *Khedersa Hajee Bappu* v. *Puthanveetil Ayissa Ummal*[6] and *Abdul Majeeth* v. *Krishnamachariar*[7] it was pointed out that in the case of Muhammadan co-heirs one cannot

1. (1935) 70 M.L.J. 162.
2. (1887) I.L.R. 12 Bom. 101.
3. (1895) I.L.R. 20 Bom. 338.
4. (1928) 30 L.W. 995.
5. (1918) I.L.R. 43 Bom. 413.
6. (1910) 20 M.L.J. 288 : I.L.R. 34 Mad. 511.
7. (1916) 32 M.L.J. 195 : I.L.R. 40 Mad. 243.

represent the interests of the other. Though in *Khirajmal* v. *Daim*[1] it was found that the party who was not on record was sufficiently represented yet their Lordships also observed that the Court will have no jurisdiction to sell the property of persons who were not parties to the proceedings or who were not properly represented on record. In this case, in view of the fact that it cannot be said that the other six defendants can be said to represent the interests of the seventh defendant or her heirs, the sale will not be valid so far as they are concerned.

The learned Judge has set aside the sale not only with regard to the petitioners but also with regard to the other defendants. There was no justification for it. The other defendants were all parties to the proceeding and they did not file any petition to set aside the sale. If their interests are distinct and different from the interests of the seventh defendant (and it is only on that basis it has been contended that they cannot be said to represent the interests of the seventh defendant) how could it be said that the failure to implead the heirs of the seventh defendant would invalidate the sale so far they were concerned? In *Official Receiver, Nellore* v. *Venkiah*[2] this Court found that certain of the judgment-debtors were not properly represented in the execution proceedings and holding that hence the sale so far as they were concerned was without jurisdiction confirmed the sale as against those persons who had been properly represented in the suit. The sale was set aside only as against those persons whom this Court found were not properly represented in the proceedings. In *Venkatarama* v. *Somasundara*[3], it was pointed out that the sale would be invalid only with regard to the legal representatives of the deceased judgment-debtor who were not served with the requisite notice under Order 21, rule 22 and that the sale will not be void in its entirety. The Calcutta High Court also in *Srishchundra Nandi* v. *Rahmatannessa Bibi*[4] which was followed in *Anil Kumar* v. *Ahammed Ali*[5] has held that the sale could be set aside only as against those persons to whom notice under Order 21, rule 22 has not gone.

In the result, the order of the learned District Judge setting aside the sale *in toto* is set aside and instead, the sale so far as the petitioners in E. A. No. 1677 of 1941 who are the legal representatives of the deceased seventh defendant are concerned, is set aside. Parties will receive and pay proportionate costs in all the three Courts. There will be one set of advocate's fee.

B.V.V. ——— *Order modified.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

R. T. Rangaswami Ayyangar .. *Appellant**

*v.*

Subbaraya Goundan and others .. *Respondents.*

*Execution—Cross-decrees between parties—Before entering satisfaction of one and pending execution for the balance stay obtained by the judgment-debtor in one, claiming relief under Madras Act (IV of 1938), sections 19 and 20—Executing Court cannot proceed ignoring stay.*

Where there were between the appellant and the respondent cross-decrees, and the appellant had applied for execution of the decree in his favour after adjustment of the decree held against him and the recording of full satisfaction on it and part satisfaction of the former, but in the meanwhile the respondent had obtained stay of proceedings against himself claiming to be an agriculturist entitled to the benefits of sections 19 and 20, Act IV of 1938,

*Held*, that until orders had been passed by the Court in the execution applications the two decrees do not become adjusted one against the other; when therefore a stay application intervened, it was not within the competence of the executing Court to proceed with what is essentially a process of execution ignoring the stay; and no adjustment is possible.

Appeal against the order of the District Court of Coimbatore, dated 22nd October, 1942, and made in A.S. No. 225 of 1942 preferred against the order

1. (1904) L.R. 32 I.A. 23 : I.L.R. 32 Cal. 296 (P.C.).
2. (1941) 1 M.L.J. 569.
3. A.I.R. 1933 Mad. 224 : 142 I.C. 658.
4. (1930) I.L.R. 58 Cal. 825.
5. A.I.R. 1940 Cal. 23.

*A.A.A.O. No. 102 of 1943. 10th December, 1943.

of the Court of the District Munsiff of Tirupur, dated 13th March, 1942, and made in E.A. No. 100 of 1941 in E.P.R. No. 1557 of 1940 in O.S. No. 491 of 1935.

*A. C. Sampath Aiyangar* for Appellant.

*K. V. Ramachandra Aiyar* and *S. Ramachandra Aiyar* for Respondents.

The Court delivered the following

JUDGMENT:—The appellant on 13th January, 1941, obtained an assignment of a decree in O.S. No. 383 of 1935 for Rs. 885 passed against the first respondent. The first respondent in 1937 had obtained a decree in O.S. No. 491 of 1935 for a sum of Rs. 833 against the appellant. That decree was under attachment at the instance of a creditor of the appellant. On the 20th January, 1941, the appellant filed three execution applications. The first was the main execution petition 63 of 1941 in which he sought to execute the decree in O.S. No. 383 of 1935 as assignee. In E.A. No. 102 of 1941 the appellant applied to record part satisfaction of the decree in O.S. No. 383 by the adjustment of the decree in O.S. No. 491. In E.A. No. 100 of 1941 the appellant applied to the Court for entry of full satisfaction of the decree O.S. No. 491 against himself by reason of the adjustment. While those three matters were pending the respondent on 16th April, 1941, filed an application for stay of the decree in O.S. No. 383 against himself, claiming to be an agriculturist entitled to the benefits of sections 19 and 20 of Madras Act IV of 1938. A stay was granted and he followed up that application by a substantive application under section 19 of the Act, I.A. No. 555 of 1942, dated the 9th April, 1942. As a result of these proceedings under sections 19 and 20 of Act IV of 1938 the Courts below have rejected the appellant's applications to adjust the two decrees and execute only the balance of the greater decree. It seems to me that that decision is obviously correct. If the adjustment and the recording of satisfaction had been carried out before the respondent claimed the benefits of Act IV of 1938, and obtained a stay of proceedings in execution of the decree in O.S. No. 383, the position might have been different; but when once the proceedings in execution of the decree in O.S. No. 383 had been stayed it is not, in my opinion, possible to adjust the two decrees or to permit execution for the balance of the decree in O.S. No. 383. Until the disposal of the petition under section 19 all proceedings in execution of the decree in O.S. No. 383 must cease. I am unable to accept the contention of the appellant that the adjustment contemplated in Order 21, rule 18 of the Code of Civil Procedure comes into being automatically the moment there are two applications for execution of cross-decrees between the same parties. In my opinion the satisfaction of the smaller decree and the part satisfaction of the larger decree are the result of an act of the Court making orders in the two execution applications and until those orders have been passed the two decrees do not become adjusted one against the other. When therefore a stay application intervenes, it is not within the competence of the executing Court to proceed with what is essentially a process of execution, ignoring the stay.

The appeal is therefore dismissed with costs.

(One set) Leave to appeal is refused.

S. Siluvai Antony Nadar and another .. *Accused.**

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE SHAHABUDDIN.

S. Siluvai Antony Nadar and another .. *Accused**.

*Indian Evidence Act (I of 1872), section 33—Witness serving in the army—Address of the witness not unascertainable—Whether deposition before committing Magistrate could be admitted as direct evidence at the Sessions trial.*

Where an important witness in a murder trial was serving in the army and his address was not unascertainable,

* R. T. No. 164 of 1943. 10th November, 1943.
(Crl. App. No. 580 of 1943).

*Held*, that his deposition before the committing Magistrate could not be admitted as direct evidence for it could not be said that he could not be found or that any delay or expense which might be involved would be unreasonable having regard to the public interests involved in examining, in the box and in the presence of the Judge and assessors, the principal witness in so serious a charge as murder.

Trial referred by the Court of Session of the Tinnevelly division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 56 of 1943 on 16th August, 1943 and appeal by the prisoner.

*A. K. Pavithran* for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Judgment of the Court was delivered by

*King, J.*—We do not propose in this case to say anything in detail about the evidence given against the appellants, two of whom have been sentenced to death and two to transportation for life in connection with the murder of one Diravia Nadar on the 26th of February last. We note however from the judgment of the learned Sessions Judge of Tinnevelly that the principal evidence against the accused consisted of the deposition of one Thomas *alias* Subramania Nadar before the committing Magistrate. This deposition was admitted as direct evidence at the Sessions under the provisions of section 33 of the Evidence Act. Section 33 provides that that can be done if the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. In the present case, the decision of the learned Judge to admit this evidence under section 33 was evidently based upon a statement by P. W. 15, the police constable, who says that summons to this witness could not be served as he had joined the army and his address was not known. No similar questions were put to the Sub-Inspector of Police examined as P. W. 16 and nothing elicited as to what further steps the prosecution took to discover the address of the witness. In these circumstances and in view of the fact that the evidence of this witness is of such paramount importance in deciding the case against the appellants, we have come to the conclusion that the learned Sessions Judge was not, in the circumstances of this case, justified in applying section 33 of the Act, and that he might have well satisfied himself by further enquiries whether the application of that section was really necessary. The learned Public Prosecutor has now furnished us with the present address of the witness. It appears from the information now at his disposal that he (Thomas *alias* Subramania Nadar) is in camp at Muttra in Northern India. Our natural suspicion therefore that the address of a newly joined recruit in the army could not be unascertainable, as P.W. 15 seems to suggest, has been confirmed by the information now furnished. There can therefore be no reason for the application of section 33 on the ground that the witness cannot be found. The only question that remains is whether his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. We are emphatically of the opinion that any delay or expense which might be involved in this case is disproportionate to the public interests involved in examining, in the box and in the presence of the learned Judge and the assessors, the principal witness upon so serious a charge as this.

We accordingly set aside the convictions and direct that the appellants be retried on the same charge by the learned Sessions Judge of Madura.

V.P.S. — *Retrial ordered.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

The Public Prosecutor .. *Appellant**

*v.*

Vadakattu Jogiraju .. *Respondent.*

*Defence of India Rules (1939), rules 90 (2)* (d) *and 90 (3)—Stationery shop owner acquiring small change amounting to Rs. 17 and odd—Whether an offence.*

It is not the acquisition of small change that is made an offence under the Defence of India Rules, but the acquisition beyond a particular limit, namely, beyond what is required for the daily needs of the business.

Where most of the purchases made at a stationery shop were by litigants, school boys and sundry persons who may pay in rupee coins and expect to receive small coins as change, the possession in small coins by the shop-keeper amounting to Rs. 17 and odd, cannot be deemed to be in excess of his requirements.

In re *Kalappa Mandayya Servai*, (1943) 2 M.L.J. 280 and *Emperor* v. *Charandas*, A.I.R. 1943 All. 329, followed.

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (accused) by the Court of Session of the East Godavari division in C. A. No. 68 of 1943, preferred against the order of the Court of the Sub-Divisional Magistrate, Cocanada in C. C. No. 14 of 1942.

The Public Prosecutor (*V. L. Ethiraj*) in person.

*V. T. Rangaswami Aiyangar* for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the Crown against the order of the learned Sessions Judge of East Godavari acquitting the accused in C. C. No. 14 of 1943 on the file of the Sub-Divisional Magistrate, Cocanada, who was convicted by that Magistrate for an offence punishable under rule 90 (3) read with rule 90 (2) (*d*) of the Defence of India Rules. The charge against him was that he had acquired more coins than required for his business. The accused and three of his brothers were all trading. They had a stationery shop, a hardware shop, a grocery shop and a fancy goods shop. Of these four businesses, the accused was in charge of only one. The house and shops of all these brothers were searched and small change of the value of Rs. 111-2-10½ was found, but the accused alone was prosecuted and in the charge it was stated that he had acquired this amount of Rs. 111-2-10½ in excess of his requirements. Later on, in the appellate Court, the case proceeded as if the charge was for being in possession of change for Rs. 17-14-5 which was the amount found in the room of the accused and that was the amount which he is said to have had for his stationery shop. There is no finding as to whether this amount was more than what was required for his business, namely, the stationery shop. The evidence that was let in was in respect of all the businesses together and according to the Village Munsiff the change that might be required will be about fifty rupees. But then it is in evidence that the annual turn over of the business was Rs. 48,000. I am not sure whether the estimate of the Village Munsiff was not low. Whatever it may be, there is no evidence to show that the requirements of the accused did not require him to have change for Rs. 17 odd. Being a stationery shop, most of the purchases will be made by litigants and school boys and other sundry persons. They would not be paying only in change and if they pay in rupee coins or notes they will have to be given change. Rs. 17 does not therefore appear to my mind to be in excess of the requirements of a stationery shop-keeper. So I do not think it could be said that the learned Sessions Judge was wrong in having acquitted him.

But then the appeal has been filed because the learned Sessions Judge disposed of the appeal on the ground that the accused cannot be said to have acquired the change which he was in possession of because he got them in the course of his trade. This matter had to be considered by me in the case reported in In re *Kalappa Mandayya*

* Crl. App. No. 659 of 1943. 12th January, 1944.

*Servai*[1] and I have pointed out there that a person who gets coins by vending his articles acquires such coins. As I have stated there, it is not the acquisition that is made an offence but the acquisition beyond a particular limit, namely, beyond the amount required for his daily needs. My attention is drawn to the ruling of the Allahabad High Court in *Emperor* v. *Charandas*[2]. But there even in that judgment the process of getting money by a shop-keeper in exchange of his wares is described as an acquisition in the following sentence:

> "A shop-keeper, however, may acquire coin in a legitimate and normal way, for example, if a shop-keeper has got a flourishing retail business, he may acquire coins of various denominations of considerable value every day."

So, even that Judge described that process as one of acquisition. It is acquisition beyond a limit that has been prohibited by the statute. In these circumstances the learned Sessions Judge was not justified in finding that the getting of coins by a shop-keeper in exchange of his ware is not an acquisition contemplated by the statute.

The appeal is accordingly dismissed.

V.P.S. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE KUNHI RAMAN.

Kalepalli Venkata Rao .. *Appellant**

*v.*

Kalepalli Padmavalli Tayaramma .. *Respondent.*

*Award—Reference to arbitrators—Allocation of debts—Decision to be worked out later—Validity—Mistake of law—Setting aside award—Mistaken interpretation of law—Whether sufficient ground.*

On a reference to arbitration the arbitrators were required to divide the entire property and the debts mentioned according to their good and bad qualities. With reference to the debts the award provided as follows: "Regarding the joint debts due to others the parties shall discharge the debts due to others according to the accounts in half and half. As it has been learnt that some of the creditors filed suits . . . . and as none of the creditors are parties to the karamama in our favour it has not been possible to divide the said debts."

*Held*, that it could not be said that the arbitrators had refused to make the award with reference to the debts, and that they had sufficiently allocated the liability of the parties leaving the ministerial acts to be completed after the figures of the debts were finally known.

*Ramji Ram* v. *Saligram*, (1911) 14 C.L.J. 188, referred to and *Dandekar* v. *Dandekar*, (1882) I. L. R. 6 Bom. 663, distinguished.

In the case of an award a mistake of law can be invoked to obtain the intervention of the Court only if it is a mistake of law with regard to a private right. Where the award was based on an erroneous interpretation of a general statute such as the Hindu Women's Rights to Property Act,

*Held*, that the award could not be set aside on the ground of mistake of law.

*Cooper* v. *Phibbs*, (1867) L.R. 2 H.L. 149 at 170 and *Appavoo Chettiar* v. *The South Indian Railway Co.*, (1928) 56 M.L.J. 269, referred to.

Appeal against the order of the District Court of Kistna at Chilakalapudi dated 31st October, 1941 and passed in O. S. No. 8 of 1941.

*K. Krishnaswami Ayyangar* for Appellant.

*B. V. Ramanarasu* and *V. Govindarajachari* for Respondent.

The Judgment of the Court was delivered by

*Mockett, J.*—One Nagabhushanam Garu had three sons. We are concerned in this appeal with two of them; the husband of the respondent and his brother, the appellant. The respondent's husband having died, there was a reference made to arbitration to which the widow and her brother-in-law were parties. Under that reference two members of the Bar were appointed as arbitrators and it was stated in that reference that according to the will left by her husband the plaintiff had acquired a right to his entire properties and that on the strength of the will and on the strength of the Hindu Women's Rights to Property Act she was entitled to have a partition effected in respect of the entire properties, balance of goods

1. (1943) 2 M.L.J. 280. 2. A.I.R. 1943 All. 329.

* A. A. O. No. 338 of 1942. 2nd December, 1943.

and other assets of the joint family. Accordingly the task of the arbitrators was, as set out in paragraph 6, to divide the entire property and the debts mentioned in the schedule according to their good, middling and bad qualities. At one stage a criticism was made that no schedule had been prepared but Mr. K. Krishnaswami Ayyangar, who appears for the appellant, was constrained to agree that a complete list of the assets and liabilities was before the arbitrators and that nothing could be made of that. An award was made and it is right to say that seldom does the Court see coming from these private references in the mofussal so clear and careful an award. It has, however, been attacked on two grounds, which can be very briefly stated. The first ground was based on the wording of paragraph 9 of the award which reads as follows :

"Regarding the joint debts due to others, the parties shall discharge the debts due to others according to the accounts in half and half. As it has been learnt that some of the creditors filed suits and as Padmavalli Tayaramma is contending as regards certain debts standing in the joint accounts that they are not valid and as some of the debts have been decreed and as none of the creditors are parties to the kararnama in our favour it has not been possible to divide the said debts."

It must be remembered that the paragraph begins with the words "the parties shall discharge the debts due to others according to the accounts in half and half." It has been argued for the appellant that this is an example of arbitrators refusing to make an award with regard to the most important part of the subject-matter and is on the same basis as the facts which are reported in *Dandekar* v. *Dandekar*[1] where the arbitrators refused to divide the lands on the ground of inconvenience to the arbitrators in going to the lands in rainy weather. We are entirely opposed to the contention of the appellant. In our view clause 9 is simple in its meaning and effect. All that it says is this, that it is not possible to ascertain the precise figures of the debts which are due to other people but when ascertained—and they must necessarily be ascertained by process of time—the parties should discharge them according to the accounts which were obviously before the arbitrators in equal shares, that is to say, half and half, a sensible and businesslike method of dealing with an outstanding matter. The other alternative apparently would have been to adjourn the arbitration until all the suits had been decided and the precise figures ascertained. This is an example of the position to which Mookerjee, J., refers in *Ramji Ram* v. *Saligram*[2] namely, where only ministerial acts remain to be done to complete the award, it is not incomplete for that reason.

The other point taken is based on the wording of that part of the reference which refers to the plaintiff's claim based on the Hindu Women's Rights to Property Act. The history of that legislation is well known. The Act was passed in 1937 and it purported to give Hindu widows a widow's estate in the husband's share in the properties of the joint family. The agreement is dated 17th September, 1939, when the general public supposed that this Act did confer this general right on Hindu widows. But on the 22nd April, 1941, the Federal Court in In re *the Hindu Women's Rights to Property Act*, 1937[3], held that the Act did not apply to agricultural property and that though a Hindu widow obtained a life estate under the Act in non-agricultural property, she did not in agricultural property. It has therefore been argued that there has been a mistake of fact which vitiates this award and that we should in consequence interfere. Now the authorities on the subject appear to be clear that a mistake of law, because this is unquestionably a mistake of law, can only be invoked to obtain the intervention of the Court if it is a mistake of law with regard to a private right. The position is dealt with by Lord Westbury in *Cooper* v. *Phibbs*.[4] Lord Westbury observes as follows :

"There can be no doubt of the rule of a Court of Equity with regard to the dealing with that agreement. It is said '*Ignorantia Juris haud excusat*' ; but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, the maxim has no application. Private right of ownership is a matter of fact ; it may be the result also of matter of law ; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that agreement is liable to be set aside as having proceeded upon a common mistake."

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1. (1882) I.L.R. 6 Bom. 663.
2. (1911) 14 C.L.J. 188.
3. (1941) 3 F.C.R. 12 : (1941) 2 M.L.J. 12 (F.C.).
4. (1867) L.R. 2 H.L. 149 at 170.

In the case before the House of Lords the right about which there was a misapprehension was based on the misconstruction of a deed and the misconstruction of a private Act. No question of construction of any public Act was considered. A Bench of this Court (Ramesam and Jackson, JJ.) had to consider this very question in *Appavoo Chettiar* v. *The South Indian Railway Co.*[1]. Ramesam, J., points out that Lord Westbury's observations are to be read in the light of the facts before him and not in a general sense and that the mistake must be a mistake with regard to a private right rather than a general right and that in the case before them which concerned a consignment of goods by the South Indian Railway Company the mistake of law was as to the general law in British India. The question therefore in this case is, was there a mistake with regard to the general law ? The answer must be in the affirmative. The Act, XVIII of 1937, was an Act of the Central Legislature. It referred to the rights of all Hindu widows ; it did not refer to Hindu widows in the Madras Presidency. No authority has been cited to us for the proposition that a mistake with regard to the terms of a general statute can be invoked to obtain the intervention of the Court. That being so, this objection also must fail.

Other objections were mentioned by Mr. Krishnaswami Ayyangar but he abandoned them all, for example, that there had been misconduct on the part of the arbitrators.

This appeal must be dismissed with costs.

B.V.V. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE HORWILL

Revenue Divisional Officer, Trichinopoly .. *Appellant**

*v.*

S. Varadachari .. *Respondent.*

*Land Acquisition Act (I of 1894), sections 4 and 11—Ryotwari land—Compensation—Mode of ascertaining —Value of land in neighbourhood—Allowance for enhanced value due to rise in price of paddy.*

In awarding compensation for land compulsorily acquired the land acquisition officer should first of all estimate the value of the land, and with that value as a basis take into consideration any other special factors and calculate the proper compensation to be paid. If the value of the land can be directly estimated by the value of the property in the neighbourhood, then that is the best manner of estimating the value of the land acquired provided that there has been a sale of the land at or about the time when the acquisition was notified.

Where the sales of neighbouring land which formed the basis of the award of the Land Acquisition Officer were dated January 1936 and the notification was in November 1938, and it appeared that in between those dates the price of paddy had appreciated to a certain extent,

*Held*, that the proper method of awarding compensation was to proceed on the value of the land in the neighbourhood at the same time making an allowance for the enhanced value in proportion to the rise in the price of paddy.

In awarding compensation, whatever may be said with regard to a melwaram interest in a zamindari land or a vacant site it is difficult to accept the current rate of interest on gilt-edged securities as a safe guide to the multiple to be applied to the annual profits on ryotwari land.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly, dated 8th October, 1941 and passed in O. P. No. 35 of 1940.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

*K. R. Rangaswami Ayyangar* and *S. Venkatesan* for Respondent.

The Judgment of the Court was delivered by

*Horwill, J.*—This is an appeal by the Government against the order of the Subordinate Judge of Trichinopoly on a reference under section 18 of the Land Acquisition Act increasing the compensation awarded by the Land Acquisition Officer from Rs. 8-4-0 per cent. to Rs. 10 on an area of 2·75 acres in the Srirangam Municipality in Town Survey No. 2394.

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1. (1928) 56 M.L.J. 269.

* App. No. 116 of 1942. 20th August, 1943.

The Land Acquisition Officer based his award upon the sale price of two plots of land situate about a furlong from the land acquired. As he was of opinion that the land sold under those sale deeds was of the same quality as that acquired, he thought that the rate at which the land was sold in those two cases afforded a proper basis for the awarding of compensation in this case. The learned Subordinate Judge, purporting to follow *Land Acquisition Officer, Calicut* v. *Subba Rao*[1] was of opinion that it was not proper to estimate the market value of the land by such a method and that the Land Acquisition Officer should have capitalised the annual profits at 30 years' purchase, as was done in the case he purported to follow. The contention of the Government in appeal is that the basis upon which the Land Acquisition Officer valued the land was the correct one. The claimant has filed a memorandum of cross-objections in this Court on the ground that the learned Judge has not properly estimated the value of paddy, which is necessary for converting the lease amount—which is fixed in kind—into money and has omitted to take account of the fact that in the lease deed relied on a part of the rent was payable in straw, which would work out at about Rs. 3 an acre.

The learned Subordinate Judge is clearly wrong in thinking that *Land Acquisition Officer, Calicut* v. *Subba Rao*[1] intended to lay down a rule that even if the value of the land could be directly estimated, that value was irrelevant and that the proper way of calculating the compensation payable was always to multiply the annual profits by thirty. The learned Judges in that case were considering the compensation payable for a vacant site in Calicut; and it does not seem that in that case there was any material available whereby the actual value of the site could be directly estimated. Perhaps the learned Subordinate Judge was misled by a passage in the judgment in that case in which it was said :

"It is clearly laid down in the case already cited (*Collector of Kistna* v. *Zamindar of Chellapalli*[2]) that it has long been the practice of the Courts in this Presidency to calculate the profits made by investing money in gilt-edged securities."

Section 11 of the Land Acquisition Act makes it clear that in awarding compensation the Land Acquisition Officer should first of all estimate the value of the land, and with that value as a basis take into consideration any other special factors and calculate the proper compensation to be paid. It is in fact not denied by the learned advocate for the claimant in this Court that if the value of the land can be directly estimated by the value of the property in the neighbourhood, then that is the best manner of estimating the value of the land acquired, provided that there has been a sale of the land in the neighbourhood at or about the time when the acquisition was notified under section 4 of the Act.

Before considering the direct evidence with regard to the value of the land by comparing it with lands in the neighbourhood, a word or two with regard to the case which the learned Subordinate Judge purported to follow seems necessary. The judgment in *Land Acquisition Officer, Calicut* v. *Subba Rao*[1] was based on two judgments in *Collector of Kistna* v. *Zamindar of Chellapalli*[2], in which the learned Judges were considering what compensation should be paid for acquisition of a melwaram interest in a zamindari land. In such a case direct evidence was difficult to obtain; and the learned Judges considered a melwaram interest in land as equivalent to gilt-edged securities. Prior to that decision, the general rule adopted both in the Courts in India and in England was to estimate the value of the land—in cases where direct evidence was not obtainable—by multiplying the annual profits by twenty unless special circumstances existed which indicated that the value should be calculated as some different multiple of the annual profits. In *Land Acquisition Officer, Calicut* v. *Subba Rao*[1], the learned Judges, as already stated, were considering the value of a site in Calicut. It is not necessary for us to express any view on this departure from past practice; for whatever may be said with regard to a melwaram interest in a zamindari land or a vacant site, it is difficult to accept the current rate of interest on gilt-edged securities as a safe guide to the multiple to be applied to the

1. (1941) 2 M.L.J. 75.
2. (1937) 2 M.L.J. 744: I.L.R. (1938) Mad. 431.

annual profits on ryotwari land. The landlord in such cases not only expects to get a return on the capital invested on the land but also something in addition to that as compensation for his trouble in attending to the land and for the risks involved in the cultivation of land. Although the tenants may agree to pay him a fixed rent in money, yet if a full crop is not raised on the land either through failure of rain or because of pests or for any other reason, it is extremely difficult for the landlord to realise the rent. For these reasons, the landlord naturally expects an appreciably larger return than he would expect from gilt-edged securities, which he leaves in the bank and for the realisation of the interest on which he is put to no trouble whatsoever. In a case that has been decided since *Land Acquisition Officer, Calicut* v. *Subba Rao*[1], to which one of us was a party, namely, *Sub-Collector, Rajahmundry* v. *Parthasarathi*[2], it was held that thirty years' purchase did not give the probable value of the land. It was found on the facts of that case that twenty years' purchase gave the nearest practical approach to the value of the land. A passage from that judgment is worth quoting on the question of the estimation of the value of land :

> " After all the function of the Court in awarding compensation is to ascertain the market value of the land at the date of the notification under section 4 (1). Where definite material is not forthcoming, either in the shape of sales of neighbouring land at or about the date of the notification or otherwise, the Court can only proceed to do the best it can under the circumstances. In the present case we think we shall not be erring on the wrong side if we say that the market value should be fixed by capitalising the net annual income at twenty years' purchase."

The sales which form the basis of the award of the Land Acquisition Officer were dated 27th January, 1936, and 29th January, 1936, whereas the date of the notification under section 4 (1) of the Act was 22nd November, 1938. The land sold is situate at about one furlong from the land acquired, but there is no reason to think that the fact that the land sold is situate at a short distance from the land acquired is of any importance. The karnam has given evidence that the land is of the same quality as the land acquired, and there is no other evidence which suggests that this is not correct. It is however argued for the respondent that the difference between the dates of the sales and the notification does not make the sales a safe guide for the estimation of the value of the land on 22nd November, 1938, two years and ten months after the sales. That however would depend on the evidence with regard to any changes of value that had taken place between these two dates. The karnam, who gives the only material evidence on this point, says that the price of paddy rose from Rs. 3 per kalam to Rs. 3-8-0 during that interval. We may assume that on account of the rise of price in paddy there was some rise more or less corresponding to it in the value of land. For that it is not difficult however to make an allowance. After making such an allowance we do not see why the sales of 27th January, 1936 and 29th January, 1936 should not be used as a basis for calculating the value of the land acquired. On account of the rise in the price of paddy, we are of opinion that a compensation of Rs. 9-8-0 a cent. instead of Rs. 8-4-0, the value of the land in 1936, would be proper.

Although some enhancement of the award of the Land Acquisition Officer has been granted by this Court, the appellant has succeeded on the main point argued. The appellant is entitled to his costs, because the learned Subordinate Judge proceeded to estimate the value of the land on an entirely wrong basis. It follows that the memorandum of cross-objections must be dismissed. As the arguments on the memorandum of cross-objections and on the main appeal are one, we pass no separate order as to costs in the memorandum of cross-objections.

*Decree modified. Memorandum of objections dismissed.*

B.V.V.

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1. (1941) 2 M.L.J. 75.
2. (1942) 2 M.L.J. 512: I.L.R. (1943) Mad. 127.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AIYAR.

The Municipal Commissioner, Hospet .. *Petitioner**

*v.*

G. Thotappa .. *Respondent.*

*Madras Entertainments Tax Act (X of 1939), sections 11 (2) and (3) and 14 (d)—Supervisor staying in a show throughout—Obstruction by proprietor to supervisor asking him to check or leave the place.*

On the question whether the proprietor of a cinema house had rendered himself liable for offences under section 11 of the Madras Entertainments Tax Act of 1939 in having asked an officer of the municipality who had gone to the cinema with a free pass for the purpose of checking the auditorium accommodation, etc., to clear out, the officer having continued to stay in the auditorium throughout the entertainment witnessing the show instead of checking at once,

*Held*, that since a person entrusted with the duty of seeing that the provisions of the Act were complied with was also entitled to witness the entertainment and sit in the auditorium without payment and choose his own time for the checking during the course of the entertainment, the conduct of the accused in having asked the officer either to check or clear out was certainly an obstruction offered to the officer in the performance of his duty.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate of Hospet dated 8th February, 1943 and passed in C. A. Nos. 3, 2 and 1 of 1943 preferred against the judgments of the Court of the Stationary Sub-Magistrate, Hospet, dated 17th November, 1942 and passed in C. C. No. 1624 etc. of 1942.

*P. Chandra Reddi* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

*P. Basi Reddi* for the Accused.

The Court made the following

ORDER.—These are petitions filed by the Commissioner of Hospet Municipality, against the order of the Joint Magistrate of Hospet setting aside the conviction and sentence of a fine of Rs. 25 imposed by the Stationary Sub-Magistrate of Hospet in C. C. Nos. 1624, 1643 and 1745 of 1942 for offences punishable under sections 11 (2) and (3) and 14 (*d*) of the Madras Entertainments Tax Act of 1939. The accused in all these cases is the same, namely, Totappa, proprietor of Basaveswara Talkies. The charge in these three cases was that on 9th May, 1942, 30th May, 1942 and 6th June, 1942, respectively the accused failed to give reasonable assistance to the supervisor employed under the Municipality in the discharge of his duties under the Madras Entertainments Tax Act. The supervisor in question, P.W. 1, in all these cases, was one of the seven clerks of the municipal office who had been deputed by the Municipality to check whether the provisions of the Act and the rules thereunder were being complied with in Basaveswara Talkies. He had also to check the accounts relating to the issue of tickets. He went to the theatre on the dates mentioned above, obtained a free pass in his name with the purpose noted therein, namely, to check. He entered the theatre ; but instead of starting the checking, sat in the auditorium to witness the show. After sometime the gate-keeper went to him and asked him to check or quit the place. He went out, checked the accounts and complained to the proprietor about the conduct of the gate-keeper. The proprietor asked him to do the checking and go out. The supervisor went away and returned with an order from the Commissioner authorising him to sit in the theatre throughout the show. But the proprietor would not allow him to sit in the auditorium and this is how he is said to have obstructed the supervisor in the discharge of his duties.

The evidence in the case disclosed that as soon as P. W. 1 went in with the gatepass the lights were switched on to enable him to check the tickets. But instead of doing so he sat in the auditorium and told those connected with the theatre that he would check at his own convenience. The first Court found that when he was asked to go out if he was not checking, it was obstruction in the discharge of his duties as he was entitled to choose his own time for checking. But the appellate

* Crl. R. C. Nos. 588 to 590 of 1943. 7th December, 1943.
(Crl. R. P. Nos. 540 to 542 of 1943).

Magistrate was of opinion that ' there was no doubt that the supervisor did intend to sit out the show before he started the checking' and that therefore there was no obstruction caused to him by his being asked to either check or go out of the auditorium. He set aside the conviction and acquitted the accused in all the three cases. It is to revise those three orders that these three petitions have been filed.

On facts there is no dispute. The supervisor was given a free pass marked "to check" and he was allowed to enter the hall. As soon as he went in the lights were switched on to enable him to check evidently the number of persons in the hall and the number of tickets which ought to have been collected from them. But he did not check and chose to sit down and asked them to go on with the show. The gate-keeper told him that if he was not checking, as the pass was only given to him to check, he should come out of the auditorium. The subsequent order brought by him from the Commissioner was to enable him to sit throughout the show. It is urged by the learned counsel for the Municipality that the supervisor may choose his own time to check and it was not for the authorities in the theatre to state when he should do so. That right is not disputed. It is stated however that it was open to him to sit in any convenient place outside the auditorium and choose his own time for going in and checking and that he had not been prevented from doing so. The time to be chosen for checking may have to be fixed with reference to the fresh admissions into the auditorium and this could be fixed by the supervisor only if he is in the auditorium and is able to know when and who are being admitted into it. Under section 11:

"(1) Any officer authorised by the Provincial Government in this behalf may enter any place of entertainment while the entertainment is proceeding, and any place ordinarily used as a place of entertainment at any reasonable time, for the purpose of seeing whether the provisions of this Act or any rules made thereunder are being complied with; and

(2) The proprietor of every entertainment or the owner or person in charge of any place ordinarily used as a place of entertainment shall give every reasonable assistance to the inspecting officer in the performance of his duties under sub-section (1);

(3) If any person prevents or obstructs the entry of the inspecting officer, he shall, in addition to any other punishment to which he is liable under any law for the time being in force, be punished with fine which may extend to five hundred rupees."

Apart from all these it is clear from section 12 of the Madras Entertainments Tax Act that the officer authorised by the Local Government to enter the place of entertainment for the purpose of seeing whether the provisions of the Act and the rules are being complied with "shall not be required to pay for his admission to the entertainment." The use of the words "admission to the entertainment" clearly indicates that the officer who visits the place of entertainment for the purpose of ascertaining whether the provisions of the Act are complied with, will be entitled as of right to be admitted to the entertainment itself and it will not be open to the person in charge of the entertainment to refuse to permit him to enjoy the entertainment. The Magistrate therefore was not justified in finding that he was not entitled to sit throughout the show and witness it and that all that he was entitled to was to check and then go away. If he need not pay for his admission to the entertainment and he was therefore entitled to a free pass, he could certainly witness the entire show without payment and he could not be asked to go out of the auditorium. Since a person entrusted with the duty of seeing that the provisions of the Act are complied with is entitled to witness the entertainment and sit in the auditorium without payment and could choose his own time for the checking during the course of the entertainment, the conduct of the accused in having asked the supervisor of the Municipality either to check or clear out of the auditorium was certainly an obstruction offered in the performance of his duty. The order of the appellate Magistrate is therefore liable to be set aside.

But I do not think that in the circumstances of this case it is necessary to remand the appeals. It is not open to this Court in revision to set aside the order and straightway convict a respondent. The appeals will have to be remanded for the purpose of an enquiry. It is stated by Mr. Chandra Reddi, the learned counsel for the petitioner, that it is unnecessary in view of the trivial nature of the offence, and the fact that his client filed this revision petition only to have the question

settled as to whether it would be open to a servant of the Municipality who is deputed to see if the provisions of the Act are complied with to sit in the auditorium duringthe course of the entertainment and choose his time for the purpcse of checking the tickets. In these circumstances I do not think it is necessary to remand the appeals to the lower Court for being reheard and it would be enough if I merely point out that the view of the appellate Magistrate is incorrect. The petitions are accordingly dismissed.

K.C. ——— *Petitions dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Sri Kakulam Subrahmanyam and another .. *Appellants** (*Defendants*)

*v.*

Kurra Subba Rao, minor by mother and next friend, Manikyamma .. *Respondent* (*Plaintiff*).

*Transfer of Property Act (IV of 1882), section 53-A—Applicability—Agreement for sale of immovable property by a guardian on behalf of minor ward—Section 53-A not applicable.*

Section 53-A of the Transfer of Property Act is not so framed as to afford protection against claims of persons who are not parties to the contract of transfer. Where a guardian contracts to transfer immovable property belonging to his minor ward, the minor cannot be said to be the "transferor" within the meaning of the section. The term clearly refers back to the opening words of the section and must be taken to signify the person who "contracts" to transfer. The doctrine of part-performance rests on the ground of fraud which is personal and has been held to apply to the party who having entered into the contract and permitted the obligee to act on the faith of it as if it was legally perfect seeks to resile from it on the ground of imperfect execution. The minor does not claim under the "transferor" (guardian) and cannot be affected by the fraud or estopped by the conduct of his guardian.

Appeal against the decree of the District Court of Guntur in A.S. No. 496 of 1939 preferred against the decree of the Court of the Subordinate Judge of Bapatla in O. S. No. 30 of 1938.

*P. Somasundaram* and *K. Kameswara Rao* for Appellants, in S. A. No. 1315 of 1942 and Respondents in S. A. No. 1440 of 1942.

*K. Rajah Aiyar* and *K. Krishnamurthi* for Respondent in S. A. No. 1315 of 1942, and Appellant in S. A. No. 1440 of 1942.

The Judgment of the Court was delivered by

*Patanjali Sastri, J.*—These second appeals have been placed before a Division Bench as they raise a question of some general importance as to the applicability of section 53-A of the Transfer of Property Act to an agreement for sale of immovable property made by a guardian on behalf of his ward.

The facts giving rise to the case are not now in dispute. On 29th November, 1935, the plaintiff's mother and guardian entered into an agreement to sell the suit lands to defendants 1 and 2 (hereinafter referred to as the transferees) for discharge of certain debts due by the deceased father of the plaintiff. The consideration for the sale was Rs. 17,200 out of which Rs. 16,000 was to be adjusted towards the debts due to the transferees themselves on promissory notes and Rs. 1,200 was to be paid in discharge of a mortgage debt due to a third party. It is common ground that the transferees paid off this mortgage debt and were placed in possession of the properties in pursuance of the contract of sale, but the transfer had not been duly completed by the execution and registration of the deed of sale as provided for in the agreement. Taking advantage of this circumstance, the plaintiff, who is still a minor, sued by his mother appointed as next friend, for possession of the properties, impugning the transaction as not binding on him as there was no necessity for his guardian to sell the lands for discharging the debts which, it was alleged, could have been liquidated out of the income of the large extent of immovable property left by his father. The Courts below have, how-

*S. A. Nos. 1315 & 1440 of 1942. 22nd November, 1943.

ever, found, and the finding has not been challenged before us, that the plaintiff's father had left a large amount of debts which could not have been discharged from the income of the family properties and that it was necessary and beneficial to sell some of them for the purpose. While recognising, accordingly, that, if the guardian had completed the sale by the execution and registration of a deed of sale, it would have bound the plaintiff under the Hindu law, the Courts below differed as to the legal effect of the mere executory agreement of sale made by the guardian though followed by delivery of possession in furtherance of such agreement. The trial Judge held that section 53-A of the Transfer of Property Act was applicable to the transaction in question and barred the plaintiff's claim. The lower appellate Court, however, took the view that an agreement for sale of a minor's property by his guardian was void, and that its performance did not fall within the section and was no valid defence to an action brought by the minor to recover the property. It accordingly passed a decree for delivery of possession of the suit properties to the plaintiff on condition of the latter refunding to the transferees the sum of Rs. 17,200 with interest at nine per cent. per annum from the date of suit. From this decree the transferees have preferred S. A. No. 1315 of 1942 and the plaintiff has preferred S.A. No. 1440 of 1942 objecting to the direction to refund.

Now section 53-A was inserted in the Transfer of Property Act by the Transfer of Property (Amendment) Act (XX of 1929). Before the Amending Act, the Courts in this country were showing a marked tendency to import into the law of India the English equitable doctrine of part performance, so as to nullify, in effect, specific statutory provisions governing transfer of title to immovable property. The true position, however, was elucidated by the Privy Council in *Ariff* v. *Jadunath Majumdar*[1] and *Pir Baksh* v. *Mahomed Tahar*[2]. In the latter case their Lordships observed:

"The result is that, under the law applicable to the present case an averment of the existence of a contract of sale, whether with or without an averment of possession following upon the contract, is not a relevant defence to an action of ejectment in India. If the contract is still enforceable the defendant may found upon it to have the suit stayed, and by suing for specific performance obtain a title which will protect him from ejectment. But if it is no longer enforceable, its part performance will not avail him to any effect." (See *Currimboy and Co., Ltd.* v. *Creet*[3] per Lord Thankerton.)

And the observations of Lord Thankerton to which reference was made further showed that the transferee would not be protected even if his right to sue for specific performance was not barred when the suit in ejectment was instituted. It was thus made clear that the only way open to the transferee, who had entered into possession in furtherance of the contract, to protect his possession was by suing for specific performance and obtaining a registered instrument of sale, and so long as he did not perfect his title in that manner he was liable to be ejected, notwithstanding part performance by delivery of possession, however undesirable such a result might seem to be from a purely equitable point of view. It was to mitigate to some extent, the rigour of this law that section 53-A was introduced by the Amending Act of 1929, and although the decisions referred to above have been superseded in cases falling within and governed by this section, they apply in full force in all other cases, besides being of great value as indicating the correct method of approach in determining questions relating to transfers of immovable property in India without importing the rules of equity applicable to contracts of sale of real property in England. It follows that the plaintiff's suit must succeed unless the transferees can found themselves on the terms of section 53-A and invoke its protection.

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1. (1931) 60 M.L.J. 538: L.R. 58 I.A. 91: I.L.R. 58 Cal. 1235 (P.C.).
2. (1934) 67 M.L.J. 865: L.R. 61 I.A. 388: I.L.R. 58 Bom. 650 at 658 (P.C.).
3. (1933) 64 M.L.J. 103: L.R. 60 I.A. 297: I.L.R. 60 Cal. 980 at 987 (P.C.).

As the section postulates a "contract" to transfer immovable property, there was considerable discussion at the Bar as to whether an agreement entered into by a guardian on behalf of his ward was void or voidable or valid and numerous cases were cited before us. Mr. Somasundaram for the transferees, contended that, although it was held in *Ramakrishna Reddiar* v. *Kasivasi Chidambaraswamigal*[1] that an agreement of sale of immovable property of a Hindu minor, even when entered into by the guardian for necessity, was not binding on the minor in the sense that it was specifically enforceable against him, such contract was not altogether void but was, at the worst, only voidable by him after attaining majority, and reliance was placed on *Zeebunnisa Begum* v. *Mrs. Danagher*[2] in support of this view. Reference was also made to *Ramanathan* v. *Palaniappa*[3] and *Annamalai* v. *Muthuswami*,[4] where, explaining and following the Full Bench decision in *Ramajogayya* v. *Jagannath*[5] it was broadly laid down that "a guardian can, under Hindu law, bind a Hindu minor's estate by a personal contract if circumstances such as those pointed out in *Hanoomanpershad's case* exist". Learned counsel, therefore, urged that section 53-A was applicable to the case, the other conditions specified in the section being admittedly satisfied. On the other hand, Mr. Rajah Aiyar, for the plaintiff, argued that, though it must now be taken as settled that a decree against a minor's estate could be given on a simple contract debt incurred by the guardian for necessity, it was not because the contract as such was binding on the minor, but because the guardian's right of reimbursement was made available to the creditor in such cases, and he submitted that the observations in the decisions reported in I.L.R. (1939) Madras must be regarded as too wide and should not be accepted as correct, at any rate with reference to a guardian's agreement for sale of the minor's property, as a similar proposition laid down in *Krishnaswami* v. *Sundarappayyar*[6] was relied on in *Mir Sarwarjan* v. *Fakruddin Mohamed Chowdhury*[7] which was reversed by the Privy Council in *Mir Sarwarjan* v. *Mahomed Chowdhuri*.[8] The learned counsel also referred, in support of his argument to the Privy Council rulings in *Waghela Rajsangji* v. *Sheik Masluddin and Co.*[9] *and Indur Chunder Sing* v. *Radhakishore Ghose*[10] and to the Full Bench decision in *Venkatachalam Pillai* v. *Sethurama Rao*[11] where, dealing with an agreement of resale contained in a sale deed executed by a guardian and sought to be enforced by the minor after attainment of majority, the Court observed,

"the validity or enforceability of such a contract does not therefore depend upon the question whether it was conducive to the benefit of the minor or not",

and held, on the authority of *Mir Sarwarjan* v. *Fakruddin Mohamed Chowdhury*[8] that the contract was "void for want of mutuality." It was urged, in view of these decisions, that the agreement of sale evidenced by Exs. I and A must be deemed to be void and unenforceable against the minor, and that there was no room therefore for applying section 53-A. It was further submitted that even if the contract was considered to be only voidable by the minor, the plaintiff, having brought the suit for recovery of the properties in repudiation of the transaction, must be deemed to have avoided it, so that the contract was no longer in force, and the same result followed. We do not however, consider it necessary on this occasion to embark upon a discussion of these

1. (1927) 54 M.L.J. 412.
2. (1935) 70 M.L.J. 477: I. L. R. 59 Mad. 942.
3. I.L.R. (1939) Mad. 776.
4. (1939) 1 M.L.J. 792: (1939) Mad. 891.
5. (1918) 36 M.L.J. 29: I.L.R. 42 Mad. 185 (F.B.).
6. (1894) 5 M.L.J. 164: I.L.R. 18 Mad. 415.
7. (1906) I.L.R. 34 Cal. 163 (F.B.).
8. (1911) 21 M.L.J. 1156: L.R. 39 I.A. 1: I.L.R. 39 Cal. 232 (P.C.).
9. (1887) L.R. 14 I.A. 89: I.L.R. 11 Bom. 551 (P.C.).
10. (1892) L.R. 19 I.A. 90: I.L.R. 19 Cal. 507 (P.C.).
11. (1932) 64 M.L.J. 354: I.L.R. 56 Mad. 433 (F.B.).

and other decisions cited before us which are by no means easy to reconcile as we find that the case can be decided on a simpler ground.

As we have already pointed out, the plaintiff would be entitled to recover the properties in question unless the transferee's possession is protected under section 53-A. It seems to us that the section is not so framed as to afford protection against claims of persons who are not parties to the contract of transfer. It provides that "the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract; that is to say, it "imposes a statutory bar on the transferor", as their Lordships put it in *Probodh Kumar Das* v. *Dantamara Tea Co., Ltd.*[1] Where a guardian contracts to transfer immovable property belonging to his minor ward, can it be said that the minor is the "transferor" within the meaning of the section? The term clearly refers back to the opening words of the section and must we think be taken to signify the person who "contracts to transfer". It must be remembered that the doctrine of part performance rests on the ground of fraud which is personal and has been held to apply only to the party who, having entered into the contract and permitted the obligee to act on the faith of it as if it were legally perfect, seeks to resile from it on the ground of its imperfect execution. For instance, in *Blore* v. *Sutton*,[2] it was held that while a properly executed lease by a tenant for life with a leasing power would bind the remainderman, a defective agreement, though partly performed could not be enforced against him. Sir Williams Grant, M.R. observed:

"It is considered as a fraud in a party permitting an expenditure on the faith of his parol agreement, to attempt to take advantage of its not being in writing. But of what fraud is a remainderman guilty, who has entered into no agreement, written or parol, and has done no act, on the faith of which the other party could have relied? The only way in which he would be affected with fraud would be by showing that an expenditure had been permitted by him, with a knowledge that the party had only a parol agreement from the tenant for life. Without the knowledge, there is nothing in the mere circumstance of expenditure."

To the same effect are the observations of Lord Redesdale in *Shannon* v. *Brandstreet*[3]

"The party himself is bound by a part execution of a parol agreement principally on the ground of fraud which is personal. Such a ground could scarcely be made to apply to the case of a remainderman unless money had been expended and there had been an acquiescence after the remainder vested."

It may well be presumed that section 53-A which has been described by their Lordships in *Pir Baksh* v. *Mohamed Tahar*[4] already referred to as a "partial importation into India of the English equitable doctrine of part performance" was intended to have a similarly restricted operation, and the interpretation we have placed upon it accords with that view. The personal character of the "statutory bar" imposed under the section receives further emphasis from the description of its effect by their Lordships in *S. N. Banerji* v. *Kuchwar Lime and Stone Co., Ltd.*[5] as creating "rights of estoppel between the proposed transferee and transferor which have no operation against third persons not claiming under those persons". We are accordingly of opinion that section 53-A does not operate to bar the plaintiff's claim to recover the properties in question, as he does not claim under the transferor, and cannot be affected with the fraud, or estopped by the conduct of his guardian.

It only remains to consider on what terms, if any, the plaintiff should be granted a decree for possession. As already stated, the Court below has ordered

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1. (1940) 1 M.L.J. 75: L.R. 66 I.A. 293: I.L.R. (1940) 1 Cal. 250 at 254 (P.C.).
2. (1817) 3 Mer. 237: 36 E.R. 91.
3. 1 Sch. and Lef. 52 at 72.
4. (1934) 67 M.L.J. 865: L.R. 61 I.A. 388: I.L.R. 58 Bom. 650 at 659 (P.C.).
5. (1942) 1 M.L.J. 1: I.L.R. 21 Pat. 243 at 248 (P.C.).

delivery on condition of the plaintiff restoring the benefit received by him by reason of the transferees having discharged the debts payable out of his estate as provided in the agreement of sale, and the plaintiff has preferred the appeal S.A. No. 1440 of 1942, objecting to the condition. His learned counsel, Mr. Rajah Aiyar, did not suggest that an unconditional decree should have been made, but urged that the lower Court should not have directed the payment of the full amount of the debts referred to in the agreement of sale but only of the amount that would be payable in respect of them when scaled down in accordance with the provisions of the Madras Agriculturists Relief Act, No such question appears to have been raised in the Court below, and there is not even an allegation in the plaint that the plaintiff is an agriculturist entitled to the benefits of the Act. There are no materials before the Court for a proper determination of the question as to whether or not the plaintiff is an agriculturist within the meaning of the Act, and we cannot allow the question, which would involve an investigation of fresh facts, to be raised at this late stage of the proceedings.

In the result, we affirm the decree of the Court below, though on different grounds and dismiss both the appeals with costs.

K.S. *Appeals dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Addanki Sriramachandramurthy .. *Appellant**

*v.*

Ryali Venkataramanayya (died) and others .. *Respondents.*

*Civil Procedure Code (V of 1908), section 11, explanation VI—Applicability—Declaratory decree in favour of reversioners to the estate of deceased in regard to a gift by the widow—Suit by subsequently adopted son to recover possession of the property gifted on the strength of the declaratory decree—Adopted son does not claim through reversioners and section 11 has no application.*

The ostensible reversioners to the estate of a deceased Hindu filed a suit questioning the validity of a deed of gift executed by the widow of the deceased and obtained a declaration therein that the gift was not binding on the estate beyond the lives of the widow and her daughter. The widow subsequently adopted a son and he sued to recover possession of the property gifted. On the question whether the decision which the reversioners had obtained operated as *res judicata* against the adopted son;

*Held*, that explanation VI to section 11, Civil Procedure Code, would have application if the reversioners when they filed their suit could be regarded as representing the interest of the adopted son, but that was not the case. They represented only themselves and anyone coming after them and occupying the position of a reversioner. The adopted son does not come after them. He claims directly through his adoptive father. As he is not claiming through the plaintiffs in the prior suit or as a reversioner, section 11, Civil Procedure Code has no application.

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry dated 30th June, 1942, in A. S. No. 38 of 1941 (A. S. No. 89 of 1941, District Court, East Godavari) preferred against the decree of the Court of the District Munsiff of Rajahmundry in O. S. No. 159 of 1938.

*P. Somasundaram* for Appellant.

*P. Satyanarayana Rao* for Respondents.

The Judgment of the Court was delivered by

*The Chief Justice.*—This appeal raises a question of law which apparently has not hitherto been the subject of judicial decision. There is, however, no difficulty in answering it.

On the 11th February, 1887, one Addanki Subbarayudu died leaving a widow Narasamma and three daughters, Manikyam, Sooramma and Gangamma. Gangamma died in 1905 and Manikyam sometime between 1910 and 1913. On the 21st June, 1926, the widow adopted the appellant. The property of which Subbarayudu died possessed consisted of 27.94 acres which had been held by him under karnam service inams. Some of the lands were situate in the village of Dulla and

* S. A. No. 1463 of 1942. 19th January, 1944.

others in the village of Jegurupadu. In 1905 the widow applied for the enfranchisement of these inams in accordance with the provisions of the Madras Enfranchised Inams Act, 1866, and the rules framed thereunder. The Dulla lands were enfranchised in her name by an order dated the 16th October, 1905, and the Jegurupadu lands by an order dated the 31st October, 1905. On the 13th February, 1910, the widow executed a deed of gift of 6.4 acres of the Dulla lands in favour of the first defendant. Her daughters, Manikyam and Sooramma joined in the execution of the deed. At that time, there was a conflict of authority as to the effect of an enfranchisement. The conflict was settled in 1921 by the decision of the Judicial Committee in *Venkata Jagannadha* v. *Veerabadrayya*[1]. It was there held that the person who obtained an order of enfranchisement received an absolute title.

In 1910, the ostensible reversioners to the estate of Subbarayudu were Sreeramulu and Jaggaraju. They questioned the validity of the deed of gift and instituted O. S. No. 72 of 1913 in the Court of the District Judge of East Godavari for a declaration that the gift was not binding beyond the lives of the widow and her surviving daughter. The suit was successful and a decree in terms of the prayer was passed on the 12th March, 1915. Jaggaraju also questioned the adoption of the appellant and filed O. S. No. 72 of 1927 in the Court of the Subordinate Judge of Rajahmundry for a declaration that there had been no adoption and that in any event it was invalid. He succeeded in the trial Court, but on appeal to this Court, the decision of the Subordinate Judge was reversed and the validity of the adoption established.

On the 21st June, 1938, the appellant filed the present suit in the Court of the District Munsiff of Rajahmundry to recover from the first defendant the property which he had received under the deed of gift of the 13th February, 1910. The plaintiff contended that in filing O. S. No. 72 of 1913, the ostensible reversioners represented the estate of Subbarayudu and consequently the decision which they obtained operated as *res judicata*. The District Munsiff rejected this contention. He considered that the plaintiffs in O. S. No. 72 of 1913 could not be regarded as the representatives of the adopted son. Consequently he dismissed the suit. On appeal, the Subordinate Judge agreed with the District Munsiff. The plaintiff then appealed to this Court. In the first instance the appeal came before Somayya, J., who considered that as the question raised was a new one it should be decided by a Bench. At the same time the learned Judge intimated his concurrence in the opinion expressed below.

On behalf of the appellant it is said that explanation VI to section 11, Civil Procedure Code applies to this case. That explanation says :

> " Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

This explanation would have application if the ostensible reversioners in 1913 could be regarded as representing the interest of the adopted son, but this is obviously not the case. The plaintiffs in O. S. No. 72 of 1913 represented themselves and anyone else coming after them and occupying the position of a reversioner. The adopted son does not come after them. He claims directly through his adoptive father. On his adoption he dispossessed the widow and became the absolute owner of his father's estate. In the recent case of *Anant Bhikkappa* v. *Shanker Ramchandra*[2], the Privy Council held that an adopted son's rights date back to the death of the person to whom he is adopted as a son and he dispossesses a person who holds the property as a collateral of another surviving coparcener. As the plaintiff is not claiming through Sreeramulu and Jaggaraju or as a reversioner, section 11, Civil Procedure Code, has no application.

The appeal is dismissed with costs.

V.S. ——— *Appeal dismissed.*

1. (1922) 41 M.L.J. 1 : L.R. 48 I.A. 244: L.R. 44 Mad. 643 (P.C.).
2. (1943) 2 M.L.J. 599 (P.C.)

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Public Prosecutor .. *Petitioner.**

*Criminal Procedure Code (V of 1898), section 561-A—Inherent jurisdiction—Power to expunge passage from judgment of Subordinate Courts—Principles for exercise of.*

In a proper case the Court has power to expunge a part of a judgment of a Court subordinate to it ; but it will only take such action when the words objected to are not relevant to the case and are of a scandalous or very improper nature adversely affecting the character of persons before the Court.

The superior Court must carefully guard against doing anything which might tend to restrict the free expression of judicial opinion on a matter before the Subordinate Court. A Judge must confine himself to the case before him and not indulge in homilies which are liable to be misunderstood and which may land the administration in general in an awkward situation.

Petition praying that in the circumstances stated therein the High Court will be pleased to expunge certain remarks from the judgment of the Court of Session of Chittoor dated 27th April, 1943, in Crl. Ap. No. 52 of 1943 (C. C. No. 26 of 1943, Sub-Divisional Magistrate's Court, Chittoor).

The Public Prosecutor (*V. L. Ethiraj*) in person.

The Order of the Court was delivered by

*The Chief Justice.*—This is an application by the Provincial Government for an order expunging from the judgment of the Sessions Judge of Chittoor certain remarks made by him in Crl. Appeal No. 52 of 1943.

The appellant was a village shopkeeper. On the 9th October, 1942, he was discovered to have in his possession nine bags of paddy weighing 18 maunds, and seven bags of rice weighing 17½ maunds. He had no licence. A licence was required for the storage of more than 20 maunds. As he had stored grains in excess of 20 maunds, he was prosecuted under the Food Grains Control Order, which became law on the 22nd June, 1942. He was fined Rs. 50 and the 16 bags of grains, valued at Rs. 300 were forfeited to the Government. He did not challenge the validity of his conviction ; but he appealed against the order of forfeiture. The appeal was allowed because the offence had been committed on the 9th October, 1942, and the power to forfeit had not been conferred upon Magistrates until the 5th February, 1943, when an amendment was made in rule 81 (4) of the Defence of India Rules in order to give such power. The appeal was rightly allowed, but the Sessions Judge did not confine himself to the legal question involved. In the course of his judgment he said :

> " Moreover, not all breaches of a new law of this sort should be prosecuted as a matter of course. Where the breach is due to ignorance of the law and not to deliberate evasion of the law, the sensible course would be to give merchants a caution and a reasonable opportunity to obtain a license. A new order designed to help the public should be ushered in with consideration and tact coupled with firmness. The co-operation of the public in enforcing these new orders is best gained by such a reasonable policy. On the other hand, to impose severe penalties for unwitting infringement in the early days of the order is calculated to alienate co-operation and to create the unpleasant impression that officials take a positive pleasure in hunting non-officials. That is deplorable. Officials and the laws which it is their duty to enforce are intended to help and not to hinder or to alienate the public."

This is the passage which the Court is asked to expunge. We have no doubt that in a proper case, the Court has power to expunge a part of a judgment of a Court subordinate to it ; but it will only take such action when the words objected to are not relevant to the case and are of a scandalous or very improper nature. In *Panchanan Banerjee* v. *Upendranath Battacharjee*[1], Sulaiman, J. (as he then was) said that he saw no reason why the inherent power of the Court should not comprise a power to order a deletion of passages which are either irrelevant or inadmissible and which adversely affect the character of persons before the Court. We agree, but the observations of the Sessions Judge of Chittoor do not affect the character of any particular person. They are more in the nature of a homily, although perhaps, not a well chosen one. In *Petition by the Advocate-General, Punjab*[2], Din Mohammad, J.,

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* Crl. M. P. No. 902 of 1943. 15th December, 1943.

1. (1926) I.L.R. 49 All. 254 at 255.
2. I.L.R. (1939) Lah. 327.

said Courts are not expected to play to the gallery, nor to invoke the press in a manner which is liable to be misunderstood and may land the administration in general in an awkward situation. These observations are not out of place here. It would have been far better if the learned Sessions Judge had confined himself to the case before him and had omitted the observations complained of, but it is a different matter to say that they are of such a nature that the Court should expunge them from the record. The Court must carefully guard against doing anything which might tend to restrict the free expression of judicial opinion on a matter before the Court. While we consider that the homily should not have been indulged in and we do not agree with all the Sessions Judge has said, we do not think that this is a case which calls for expunction.

The application is dismissed.

K.S. *Application dismissed.*

## [THE FEDERAL COURT OF INDIA.]

PRESENT:—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

Thakur Jagannath Baksh Singh .. *Appellant**

*v.*

The United Provinces .. *Respondent.*

*Government of India Act (1935), section 208 (b)—Leave to appeal to Privy Council against decision of Federal Court—Circumstances justifying the grant of leave.*

The question of grant of leave to appeal to the Privy Council against the decision of the Federal Court must be dealt with on the facts and circumstances of each case and it is neither possible nor desirable to crystallise the rules relating to the exercise of the Court's discretion in the matter.

Where the litigation involves not only a question as to the interpretation of the Constitution Act, but broader questions which bear on a controversy which has long been agitated in the Courts in India, namely, the nature and extent of the rights secured to Taluqdars by the Oudh Settlement and the extent of the immunity thereby secured to them from legislative interference and the decision of the Federal Court in the case affects pecuniary interests of a very large value and the number of people vitally interested in the question is also very large and it is inevitable that the controversy must arise again and again every time that the legislatures in India attempt to deal with the rights of landholder and tenant in the Indian Provinces, the circumstances make the case one in which leave to appeal to the Privy Council should be granted.

In the matter of a petition for leave to appeal to His Majesty in Council under section 208 (*b*) of the Government of India Act, 1935.

*P. L. Banerjee* and *K. K. Raizada* instructed by *B. Banerjee*, Agent, for Appellant.

*N. P. Asthana* (Advocate-General, U.P.) and *Sri Narain Sahai* instructed by *Swami Chand Jain*, Agent, for Respondent.

The Court made the following

ORDER.—This is an application by one of the Taluqdars of Oudh for leave to appeal to His Majesty in Council against the decision of this Court, dated the 22nd of April, 1943, in what may be conveniently referred to as the United Provinces Tenancy Act litigation. In 1939 the United Provinces Legislature enacted a comprehensive law (United Provinces Tenancy Act, 1939, No. XVII of 1939) dealing with the rights of landholders and tenants in that Province. The Taluqdars contended that several of the provisions of that Act seriously curtailed their pre-existing rights under sanads issued to them at the time of the Oudh Settlement and one of them filed the suit for a declaration that the Act or at least certain of its provisions were *ultra vires*, invalid and inoperative. It was urged in support of this claim that this legislation did not fall under entry No. 21 of List II of the Seventh Schedule to the Constitution Act and that some of the impugned provisions were opposed to the spirit, if not the letter, of sections 299 (2) and 300 (1) of the Constitution Act. Reliance was also placed on the broader ground that the doctrine that a grantor might not derogate from his own grant applied even to limit legislative powers and it was lastly contended that in view of the provisions of section 3

* Case No. 29 of 1943. 2nd November, 1943.

of the Crown Grants Act, 1895, the rights of the Taluqdars must be held to be unaffected by the provisions of the Tenancy Act. These contentions were overruled by the trial Court as also by this Court. Hence this application for leave to appeal to His Majesty in Council.

Opposing the application, the Advocate-General of the United Provinces maintained that the circumstances of the present case differed in no material respect from some of the previous cases in which this Court had declined to grant leave and he drew our attention to the reasons given in some of those cases. Those very judgments make it clear that the question of grant of leave to appeal must be dealt with on the facts and circumstances of each case and that it is neither possible nor desirable to crystallise the rules relating to the exercise of the Court's discretion in the matter. The present litigation involves not only a question as to the interpretation of the Constitution Act, but broader questions which bear on a controversy which has long been agitated in the Courts in India, namely, the nature and extent of the rights secured to Taluqdars by the Oudh Settlement and the extent of the immunity thereby secured to them from legislative interference. The affidavit accompanying the present petition for leave makes it clear that the decision in this case must affect pecuniary interests of very large value. The number of people (taluqdars and tenants) vitally interested in the decision of this question is undoubtedly very large and it is inevitable that this controversy which has been acute in this country for some years must arise again and again every time that the legislatures in India attempt to deal with the rights of landholder and tenant in some of the Indian Provinces. The judgment of their Lordships of the Judicial Committee in *Prabhat Chandra Barua* v. *King-Emperor*[1] has not touched upon the question raised in the present litigation. All these circumstances make this a case in which, in our judgment, leave should be granted. Leave is accordingly granted.

V. S. —— *Leave granted.*

## [THE FEDERAL COURT OF INDIA.]

PRESENT:—SIR PATRICK SPENS, *Chief Justice,* SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

King-Emperor .. *Appellant**

*v.*

Keshav Talpade .. *Respondent.*

*Government of India Act (1935), section 208 (b)—Leave to appeal to His Majesty in Council*—Habeas corpus *proceedings—Release of detenue since date of order sought to be appealed against—Leave cannot be granted.*

Subsequent to the order of the Federal Court in an appeal arising out of a *habeas corpus* application, the detenue was released by the Government on their own initiative, notwithstanding the dismissal of the *habeas corpus* application by the High Court. In an application for leave to appeal to His Majesty in Council against the order of the Federal Court,

*Held,* that, as there was no longer any pending matter in which such leave could be granted and further as the original petitioner had no longer any interest in the *habeas corpus* proceedings, leave could not be granted merely on the ground that the Government were disposed to question the correctness of some of the grounds on which the order of the Federal Court was based.

Application under section 208 (*b*) of the Government of India Act, 1935, for leave to appeal to His Majesty in Council from the Judgments of the Federal Court, dated the 22nd April, 1943, and 31st May, 1943, in F.C.C. No. V of 1943.

*N. P. Engineer* (Advocate-General of Bombay), (*M. M. Desai* with him) instructed by *B. Banerjee*, Agent, for Applicant.

*G. N. Joshi* instructed by *R. G. Naik*, Agent, for Opposite party.

The Judgment of the Court was delivered by

*The Chief Justice.*—This is an application by the Government of Bombay for leave to appeal to His Majesty in Council against an order made by this Court on the 22nd April, 1943, in an appeal arising out of a *habeas corpus* application. It is admitted that the detenue has been released by the Government on their own

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1. (1930) 59 M.L.J. 814 : L.R. 57 I.A. 228 : I.L.R. 58 Cal. 430 (P.C.).

* Case No. 10 of 1943. 2nd November, 1943.

initiative, notwithstanding the dismissal of the *habeas corpus* application by the High Court. We are of the opinion that there is no longer any pending matter in which leave can be granted to appeal to His Majesty in Council. Moreover, the original petitioner, who has been released by the Government, has no longer any interest in the *habeas corpus* proceeding. In these circumstances, we do not see our way to grant leave merely on the ground that the Government are disposed to question the correctness of some of the grounds on which the order of this Court dated the 22nd April, 1943, was based. The application is accordingly dismissed.

V. S. —— *Application dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Kothandarama Ayyar and another .. *Petitioners**

*v.*

Swaminatha Sastrial .. *Respondent.*

*Civil Procedure Code (V of 1908), section 2 (3) and Order 21, rule 16—Transfer of decree for execution—Death of decree-holder—Application by son to transferee Court to continue execution—Validity—Saving of limitation—Limitation Act (IX of 1908), Article 182 (5).*

A decree had been transferred by the Subordinate Judge of a place to the District Munsiff of the same place for execution. The son of the deceased decree-holder subsequently applied under Order 21, rule 16, Civil Procedure Code, to the transferee Court to be brought on record and for permission to execute the decree.

*Held*, that the application was liable to be dismissed as it was not presented to the proper Court, namely, to the Court which passed the decree.

*Held, further*, that the application was not made by the decree-holder within the meaning of section 2, clause (3) of the Code, and that consequently it was not a step-in-aid of execution within the meaning of Article 182 (5) of the Limitation Act.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Kumbakonam dated 30th December, 1942 and made in E. P. No. 261 of 1942 in S. C. S. No. 332 of 1936.

*R. Rajagopala Aiyangar* for Petitioners.

*G. Jagadisa Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—The short point which arises for decision in this revision petition is whether an application under Order 21, rule 16 of the Civil Procedure Code by the son of a deceased decree-holder to be brought on record and for permission to execute the decree was an application "in accordance with law to a proper Court for execution" within the meaning of clause (5) of Article 182 of the Indian Limitation Act.

The facts of the case in so far as they are necessary are that a decree had been transferred by the Subordinate Judge of Kumbakonam to the District Munsif's Court of Kumbakonam for execution, and the application by the deceased decree-holder's son to be brought on record was filed on the last day of limitation calculated from the date of the final order on the previous execution application. The application under Order 21, rule 16 of the Code was dismissed on the ground that it was not presented to the proper Court, and it was eventually ordered by the Subordinate Judge who had passed the decree in the first instance. The son having been brought on record he claimed to continue the execution proceedings and he relied on the presentation of the execution petition in the Munsif's Court as a step-in-aid on which a final order of dismissal was passed.

The short point taken by the judgment-debtor's learned advocate is that under Order 21, rule 16 of the Code, the son could apply only to the Court which passed the decree. The wording of the rule is clear and devoid of any ambiguity and the rule has been clearly recognised in the decision reported in *Narayan* v. *Panchanathan*[1] and other decisions which have been cited. The learned advocate for the respondent relies on the decision of the Privy Council in *Jang*

* C. R. P. No. 847 of 1943. 3rd December, 1943.

1. (1939) 2 M.L.J. 758 : I.L.R. (1940) Mad. 79.

*Bahadur* v. *Bank of Upper India, Ltd., Lucknow, in liquidation*[1]. That case arose out of proceedings under section 50 of the Code. The facts were that an application for execution against the legal representatives of a deceased judgment-debtor had been made to the Court to which the decree had been transferred for execution, instead of to the Court which passed the decree as laid down by section 50. Execution had gone on for a considerable time before the legal representative pleaded want of jurisdiction and their Lordships eventually held that although the exercise of this jurisdiction by the transferee Court was irregular in the first instance, the legal representative had submitted to it for a considerable time and could not later be heard to object. It it clear, therefore, that this case does not support the respondent's contention that an application under Order 21, rule 16 of the Code can be made to either Court at the option of the applicant. Reliance is placed on the word "may" in the rule but this does not to my mind indicate that the Court which passed the decree is merely one of several Courts to which the legal representative may apply. Execution proceedings by the decree-holder are optional and there is no compulsion upon him to execute his decree; what the rule means is that if the legal representative wishes to continue the execution proceedings, a matter which is entirely at his option, he can only do so by getting himself brought on record in the Court which first passed the decree.

Another objection has been taken by the petitioner's learned advocate that apart from the fact that the application was not being made to the proper Court, it was not made by the decree-holder within the meaning of section 2, clause (3) of the Code, which does not include a transferee whose rights have not been recognised by the Court. The application for execution to the District Munsif was therefore contrary to law for two reasons; firstly, because it was not made by a person entitled to present it and secondly, because it was not presented to the proper Court.

In the result the petition is allowed and the execution petition is ordered to be dismissed as barred by time with costs throughout.

B. V. V. ——— *Petition allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Roman Catholic Bishop of Trichinopoly, Dr. James Mendonca, by his agent Rev. Fr. Chinnapper and others .. *Appellants**

*v.*

I. A. Amirthaswami Pillai and others .. *Respondents.*

*Ecclesiastical Law—Roman Catholic church—Foundation by Vellala Roman Catholics of village—Some members introducing services of Syrian church—Suit for recovery of possession and injunction—Maintainability*

The Roman Catholic Bishop and certain resident members of the Vellala community of a place filed a representative suit for the recovery of possession of a church situated in the locality and also prayed for an injunction restraining certain other members of the community and the priests of the Syrian church from holding religious services therein. It was shown that the church had been built with funds provided by the Vellala Roman Catholics of the place, but it was open to all professing the Roman Catholic faith. Owing to some reform introduced by the then Bishop certain members of the Vellala community took possession of the church and arranged for mass to be said by Syrian priests and the suit was instituted against the latter.

*Held*, that the church must be regarded as one dedicated for the general body of Roman Catholics and the fact that it was maintained and controlled by the Roman Catholics of the Vellala community did not alter its character.

*Held further*, that the plaintiffs representing the Vellala Roman Catholics of the place were entitled to possession of the church and its properties and also for an injunction restraining the defendants from interfering in any way with the church and the conduct of the religious services therein.

*General Assembly of Free Church of Scotland* v. *Lord Overtoun*, (1904) A.C. 515, relied on.

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1. (1928) 55 M.L.J. 545 : L.R. 55 I.A. 227 : I.L.R. 3 Luck. 314 (P.C.).

* Appeal No. 91 of 1942. 2nd November, 1943.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in O. S. No. 23 of 1938.

*T. R. Venkatarama Sastri* and *A. Dorairaj* for Appellants.

*B. Sitarama Rao* and *A. V. Narayanaswami Aiyar* for Respondents.

The Judgment of the Court was delivered by

*The Chief Justice.*—The facts in this case are not in dispute. The appeal arises out of a suit filed by the Roman Catholic Bishop of Trichinopoly, the Catholic Mission, Trichinopoly and 24 Roman Catholics who are members of the Vellala community of Varaganery, a suburb of Trichinopoly. The Vellala plaintiffs had obtained permission to sue under Order 1, rule 8, Civil Procedure Ccde, on behalf of themselves and the Roman Catholic residents of Varaganeri. There were 25 defendants of whom defendants 1 to 23 were also members of the Vellala community of Varaganeri. The 24th and 25th defendants were priests of the Syrian Church, whose adherents recognise the spiritual supremacy of the Patriarch of Antioch. The subject-matter of the suit is a Roman Catholic Church in Varaganeri known as the Church of St. Francis Xavier. The suit was filed with the object of obtaining a decree for the possession of the Church and for an injunction restraining the defendants from holding religious services therein. The Subordinate Judge held that the Church was the private property of the Vellala ccmmunity and that the plaintiffs had not made out a case for the disturbance of the possession of the Vellala defendants or for the issue of an injunction. It is manifest that the Subordinate Judge erred and that the appeal of the plaintiffs must be allowed.

In the first half of the seventeenth century a Roman Catholic Church dedicated to St. Francis Xavier was built upon the site now occupied by the Church with which the suit is concerned, but it was allowed to fall into disrepair. In 1882 what remained of the old building was pulled down and the present church erected. It may be taken for the purpose of this case that the funds required for the purchase of the site and for the building of the church were provided by the Vellala Roman Catholics of Varaganeri. The new church has never been consecrated, but it has been dedicated to religious worship according to Roman Catholic rites. It would appear that after the erection of the new edifice, the Vellala community did not wish to be under the spiritual jurisdiction of the Bishop of Trichinopoly. We say this because they arranged that the Church should be dedicated by a Goanese priest of the Mylapore diocese, which is under the jurisdiction of the Roman Catholic Patriarch of Goa. The dedication by the Goanese priest took place on the 8th May, 1882, without the sanction of any Bishop. This led the Bishop of Trichinopoly to take action against those who were responsible. An interdict was issued in respect of the church and the leaders were excommunicated, but the interdict and the order of excommunication were subsequently withdrawn as the Vellala Roman Catholics of Varaganeri submitted to the spiritual authority of the Bishop of Trichinopoly. The agreement arrived at was embodied in a document dated the 31st of August, 1882, which representatives of the Vellala community signed. On the same day the Bishop of Trichinopoly signed another document in confirmation of the arrangement. The agreement provided *inter alia* that the Bishop should depute a priest for the conduct of the daily mass and on days of obligation and for the conduct of the other religious services. The members of the Vellala community undertook to free themselves from the jurisdiction of the Goanese priest and subject themselves to the spiritual authority which the Bishop had received frcm the Pope. Baptisms and confirmations were to take place in the Parish Church of the Holy Redeemer. Although the Church had been built out of funds provided by the Vellala Roman Catholics of Varaganery, they did not attempt to close the church to other Roman Catholics. In fact they built a wing on the northern side of the Church for the use of the Roman Catholics of lower social status. It may be taken that the Church was open to all professing the Roman Catholic

faith. After this satisfactory settlement of the dispute the Church was dedicated by a priest nominated by the Bishop of Trichinopoly.

According to the ritual of the Roman Catholic Church, the priest administering communion starts from the left side of the altar. It had, however, been the practice of the priest officiating in this church to start from the right, where the Vellala communicants knelt. Communion was not administered to others until it had been administered to all the Vellala communicants. The predecessor of the present Bishop of Trichinopoly considered that this practice was open to objection and accordingly directed that it should cease. This roused great resentment among a minority of the Vellala community, who obtained possession of the church and arranged for mass to be said therein by Syrian priests. It is said that there are 1500 Vellala Roman Catholics in Varaganeri and of these 1300 support the Bishop.

The church having been dedicated to worship according to the Roman Catholic rites, it cannot lawfully be used for services conducted according to the rites of the Syrian church. If the church in suit constituted a private oratory of the Vellala Roman Catholics of Varaganeri and all were in agreement with the defendants, the position might be different. In order to decide what would be the position if the church were to be regarded as a private oratory, it would be necessary to inquire closely into the provisions of the Canon Law, but it is not necessary to do this because this church cannot be regarded as a private oratory. It was built by the Vellala Roman Catholic community, but it was built for the use of all Roman Catholics and it has so been used until this dispute arose. Therefore, it must be regarded as a church dedicated for the general body of Roman Catholics. The fact that it has been maintained by a committee of Vellala Roman Catholics who have had control of it for this purpose does not alter its character.

The principles stated by the House of Lords in *General Assembly of Free Church of Scotland* v. *Lord Overtoun*[1] have direct application here. In 1843 the Free Church of Scotland was founded. Its founders were ministers and laymen who had seceded from the established Church of Scotland. They seceded in order to be free from state interference in matters spiritual. They adhered to the establishment principle and gave an unqualified acceptance of the Westminster Confession of Faith. In a formal document they asserted that these doctrines were part of the constitution of the Church and could not be altered. As a result of the generosity of its members the Free Church of Scotland received large endowments. In 1900 a majority of the members of the Free Church decided to unite with the United Presbyterian Church, the members of which were unanimously in favour of the union. The United Church was to be called the United Free Church. The United Presbyterian Church was against the establishment principle and did not maintain in its entirety the Westminster Confession of Faith. A small minority of the Free Church brought an action in the name of the General Assembly of the Free Church. They maintained that the Free Church had no power to change its doctrines or to unite with a body which did not accept those doctrines. They also claimed that the United Free Church was not entitled to the benefit of any of the endowments. The House of Lords held that their claims were well founded and reversed the decision of the Second Division of the Court of Session which dismissed their action.

The position here is analogous. A minority, or even a majority, of the Vellala Roman Catholics of Varaganeri cannot be allowed to use this church for worship which is not in accordance with the Roman Catholic ritual and therefore cannot be allowed to introduce therein priests of another Church for the purpose of conducting worship. The plaintiffs are entitled to the injunction restraining the defendants and their adherents from interfering in any way with the Church and the conduct of the religious services held therein.

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1. (1904) A.C. 515.

It remains to be decided whether the plaintiffs shall have a decree for possession. It has been contended on behalf of the appellants that the legal title is vested in the Pope whose representative is the Bishop of Trichinopoly. The decision of this question is also unnecessary for the decision of the appeal. The loyal members of the Vellala Roman Catholic community are entitled to have charge of the building for the purpose of management of the building as the management has always been in that community. We direct that possession be given to plaintiffs 3 to 26 as representing the Roman Catholics of Varaganeri, but, of course, they will hold it subject to the spiritual authority of the Bishop of Trichinopoly. The Vellala plaintiffs are also entitled to possession of the immovable properties set out in Schedule A to the plaint and to all the movable properties belonging to the Church. Unfortunately it has not been ascertained what the movable properties are. In these circumstances there will have to be an inquiry into this matter. The Subordinate Judge will hold the inquiry and submit a report to this Court within six weeks from the date of the receipt by him of the record. The appellants will have their costs here and below.

B.V.V. ——— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

[*On a difference of Opinion between* MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE HORWILL.]

Tangirala Venkateswarlu .. *Appellant**

*v.*

Kumbham Lakshmanna and others .. *Respondents.*

*Inams—Minor inam—Suit by inamdar to eject the tenants from the holding—Rights of permanent occupancy pleaded in defence—Onus.*

Where in a suit by the landholder of a minor inam to eject the tenants from the holding, the latter pleaded rights of permanent occupancy, the burden is not on the plaintiff to make out a right to evict by proving that the grant included both the melwaram and the kudiwaram interests or that the tenants or their predecessors were let into possession by the inamdar under a terminable lease but it is on the tenants to prove that they have occupancy rights.

*Naina Pillai Marakayar* v. *Ramanathan Chettiar*, (1923) 46 M.L.J. 546: L.R. 51 I.A. 83: I. L. R. 47 Mad. 337 (P.C.) explained and *Zamindar of Parlakimedi* v. *Ramayya*, (1926) 51 M.L.J. 510, dissented from.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam, dated 6th September, 1941, and passed in O. S. No. 8 of 1940.

*V. Govindarajachari* and *B. V. Ramanarasu* for Appellant.

*B. Sitarama Rao*, *D. Suryaprakasa Rao* and *M. Appa Rao* for Respondents.

The case first came before Mr. Justice Krishnaswami Aiyangar and Mr. Justice Horwill who delivered the following

JUDGMENTS : *Krishnaswami Aiyangar, J.*—This appeal raises the vexed question as to when an inam grant is to be held to comprise both the melwaram and the kudiwaram interests in the land granted and what proof is sufficient to establish occupancy rights in such land. Most of these grants, as is well known, owe their origin, to the munificence of ancient native rulers, and in many of the cases which have come before the Court, the instruments by which the grants were made, were found to have been lost. The task of ascertaining the terms of the grant was thus rendered extremely difficult and became more so by the practice widely prevalent in this province of landlords, even when they own both warams, allowing tenants to cultivate their lands from generation to generation, without giving or taking written leases. As some of these inams were of the melwaram only and some of both warams, it was by no means an easy task in a given case to ascertain and fix the line of demarcation between the rights of the inamdar and the rights of the tenant. Naturally enough, the Courts were driven to seek the assistance of legal presumptions to make up for the lack of positive evidence, but a divergence of view began to exhibit itself on the question whether it was the inamdar or the tenant who had the benefit of the presumption, the pendulam sometimes swinging towards the tenant and sometimes towards the inamdar. The earliest view would seem to be that the presumption was in favour of the inamdar. But in 1897 it was established that in Zamindary Estates, the presumption was in favour of the tenant, and from that time onwards there was a tendency noticeable in the decisions of this Court to extend the principle to inams whether major or minor. By 1918 it became almost a settled rule of the Court, that there was a presumption to the effect that all inam grants were grants of the melwaram or revenue only. But this view was definitely upset by the Privy Council decisions in *Suryanarayana* v. *Patanna*[1] and *Venkata Sastrulu* v. *Seetharamudu*[2] which were construed in *Muthu*

* Appeal No. 501 of 1941. 28th September, 1943.

1. (1918) 36 M.L.J. 585 : L.R. 45 I.A. 204 : I.L.R. 41 Mad. 1012 (P.C.).

2. (1919) 37 M.L.J. 42: L.R. 46 I.A. 123 : I.L. R. 43 Mad. 166 (P.C.).

*Goundan* v. *Perumal Iyen*[1] as inferentially establishing the opposite presumption that inam grants *prima facie* conveyed both the melwaram and kudiwaram interests. But the theory of presumptions was ultimately overthrown by the Privy Council in 1922 in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[2], when their Lordships declared that there is no presumption one way or the other, whether an inam grant is a grant of the melwaram only or is a grant of both the melwaram and the kudiwaram and that it is the duty of the Court to decide each case on its own facts independently of presumptions. Where the evidence is sufficient to enable a decision being arrived at no difficulty will be experienced. If the grant is shown to have been of the melwaram alone the inamdar would only have the right to collect the rent, but not the right to evict the tenant in occupation. If the grant was of both the warams, the position would be just the opposite, for in that case he as the grantee of the soil, would *prima facie* have the right to evict the tenant unless the tenant can establish that he has acquired a permanent right of occupancy. But let us suppose a case, by no means an uncommon one, in which we have nothing more than this ; an inam grant whose terms are unknown or uncertain ; and tenants immemorially or for a very long time in occupation paying melwaram or rent to the inamdar, but the origin and terms of the tenancy not known. How are we to decide the case, as decide we must ? One solution may be to apply the ordinary rule and to say that the burden is on the plaintiff whoever he is, the inamdar or the tenant, to make out the case with which he comes into Court. If the inamdar is the plaintiff, he fails because he is unable to prove a right to evict when he is unable to show that he is an owner entitled to the possession of the land. If the tenant is the plaintiff he fails because permanence is not an ordinary incident of tenancies in general, however long the possession. The result, as remarked by Coutts-Trotter, J., in *Muthu Goundan* v. *Perumal Iyen*[1] :

"would in most cases be a deadlock; whoever came to the Court first and found himself in the position of plaintiff would necessarily fail by that mere accident."

In cases which subsequently came up before this Court the position was again examined in the light of two further pronouncements *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[2] and *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[3] by the Board, but it only resulted in the emergence of a definite clevage of judicial opinion. In *Zamindar of Parlakimedi* v. *Ramayya*[4], Phillips, J., with whom Madhavan Nair, J., as he then was, concurred, has held, following his own decision sitting as a single Judge in a second appeal reported in *Periakaruppa Thevan* v. *Aiyanars and Kaniyala Swamigal Koil Devasthanam*[5], that the burden of proving occupancy right is thrown on the tenants only in cases where the inamdar is admitted to be the owner of the land itself. Madhavan Nair, J., observed that the decision of the Privy Council in *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[3] should be understood in the light of the two earlier decisions of the Board in both of which it was admitted or found as a fact that the tenants had been let into possession by the landholders and that consequently when the tenants claimed to possess occupancy right the burden was placed on them to make out their claim. The basis of the decision would seem to be that there is nothing unreasonable in throwing the burden of proof on the party who wishes the Court to believe in the existence of a fact—the fact being that the inamdar has the right to evict the tenant. But it has been objected that the decision does not take account of the legal implications inherent in the admitted relationship of melwaramdar and the kudiwaramdar and recognised by Wallace and Odgers, JJ., in *Aiyanars* v. *Periakaruppa Thevan*[6], which was an appeal from the judgment of Phillips, J., in *Periakaruppa Thevan* v. *Aiyanars and Kaniyala Swamigal Koil Devasthanam*[5], followed, as I pointed out, by that learned Judge and Madhavan Nair, J., in the case just referred to. The learned Judges, Wallace and Odgers, JJ., reversed the decision of Phillips, J., but without noticing the decision in *Zamindar of Parlakimedi* v. *Ramayya*[4] which was apparently not cited before them. Wallace, J., who delivered the leading judgment after stating that one who admits that he is a kudiwaramdar admits also that he is a tenant of the melwaramdar, observes :

"That being so, the defendants (tenants) by their admission that they pay melwaram to the plaintiffs admit that they are tenants of the plaintiffs. On that relationship the plaintiffs have a *prima facie* right to eject them, and as the Privy Council has laid down, the onus therefore rests on the defendants to show that they possess such right of occupancy in their holdings as will prevail against the plaintiffs' *prima facie* right to eject."

The learned Judge referred with disapproval to the view of Phillips, J., on the ground that it is in conflict with the decision of the Privy Council in *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[3]. It is the view here disapproved which was reiterated in *Zamindar of Parlakimedi* v. *Ramayya*[4].

There is thus a definite conflict of decision between two division Benches of this Court. In both cases the learned Judges were only endeavouring to interpret the decisions of the Privy Council, but came to opposite conclusions. This conflict can only be resolved by a reference to a Full Bench for the purpose of obtaining an authoritative pronouncement on the correct interpretation of the decision of the Privy Council on the point. The question for decision will be whether the Board intended to make any distinction between ryotwari and inam lands in regard to the incidence of the burden of proof. It may be mentioned that a minor inam was never and even now is not within the purview of the Madras Estates Land Act, 1908. But a major inam was an estate within the Act as it stood before the Amending Act XVIII of 1936, if the grant had been made of the revenue alone without the kudiwaram, to a person not owning

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1. (1921) 40 M.L.J. 429 : I.L.R. 44 Mad. 588 (F.B.).
2. (1922) 43 M.L.J. 640 : L.R. 49 I.A. 286 : I.L.R. 45 Mad. 586 (P.C.).
3. (1923) 46 M.L.J. 546 : L.R. 51 I.A. 83 : I.L.R. 47 Mad. 337 (P.C.).
4. (1926) 51 M.L.J. 510.
5. (1925) 49 M.L.J. 602.
6. (1929) 30 L.W. 583.

the kudiwaram. The Amending Act has altered the position by treating all major inams to be estates. It follows that before the amendment, no distinction could be drawn between a major and a minor inam in regard to the question of the onus and in fact, no case was cited before us, in which such a distinction has been recognised. But it is urged on behalf of the respondents that there is still a vital distinction between ryotwari land and inam land, and that it is only in the former class of land, that it can be truly said that the moment it is proved or admitted that the relationship of the parties is that of melwaramdar and kudiwaramdar, the burden without more is on the tenant to make out a permanent right of occupancy in opposition to the landlord's *prima facie* right to evict. This principle it is argued did not extend to inams of either description before the Amending Act, and does not now extend to minor inams which are admittedly outside the Act. It is of course desirable that this unfortunate conflict should be resolved, and I should have readily assented to the suggestion that the question be referred to a Full Bench,but for the fact that in the present case both parties have adduced their evidence, and the only question is what inference should be drawn from the facts proved. The question of onus has in my view receded into the background, and it is our duty to decide the questions at issue on the evidence on record. With these preliminary observations, I proceed to consider the facts.

The suit out of which this appeal arises was instituted by the appellant Tangirala Venkateswarlu as the holder of a minor inam, now of the extent of some 20·28 acres but originally of one Khatti or 17 acres, in the village of Bellagaruvu, to eject the respondents who are tenants in possession admittedly paying melwaram or rent to him. The inam was granted in the year 1677 by Bhanojee Suryaprakasa Rao to Putcha Viswanadham Bhotlu, an ancestor of the plaintiff; but the original grant is now not available. There is also a claim for the recovery of mesne profits, but this did not form the subject-matter of serious controversy either in the Court below or here. The defendants pleaded that the inamdar has no right and never had any, to the possession of the land but was entitled only to collect the melwaram or the rent from them. They claimed to be the owners of the kudiwaram right and as such to possess the right to the permanent occupancy of the land. This contention was upheld by the Subordinate Judge who has accordingly dismissed the suit. The plaintiff has therefore preferred this appeal.

The framework of the judgment of the Subordinate Judge shows that he approached the decision of the case with the view that the burden lay on the plaintiff to prove affirmatively that the original grant included both the warams and that the defendants were let into possession under a tenancy terminable by the inamdar. In his opinion, the burden of proving occupancy right is on the owner of the land itself and not merely of the melwaram. This opinion has the support of the ruling of this Court in *Zamindar of Parlakimedi* v. *Ramayya*[1], already referred to. In fact, the Subordinate Judge has relied on it in his judgment. There is, of course, the opposite decision in *Aiyanars* v. *Periyakaruppa Thevan*[2]; but it is not noticed by the Subordinate Judge. It is however difficult to say as matters stand at present which of the two decisions is correct. It can only be settled by a Full Bench as I have already indicated.

Whichever way the burden of proof lies, the learned Judge's conclusion that there are sufficient indications in the inam register Ex. D to show that what was originally granted must have been the melwaram only and not the land cannot be supported. Neither for this conclusion nor for his view that the suit land is an estate within the meaning of the Madras Estates Land Act,1908, is there sufficient support in the evidence on the record. He has admittedly fallen into obvious errors in reading the documents, more especially Ex. D in the way he was read them. As the learned advocate for the respondents has conceded that those findings are untenable, I deem it unnecessary to enter into a discussion of the reasons on which the Subordinate Judge has proceeded. It is sufficient to say that there is nothing in Ex. D to support any one of the three inferences drawn by the Subordinate Judge, namely, (1) that there were at the date of the grant tenants on the land paying cist or rent to the landlord whoever he was; (2) that the grantee was a resident of a village in another district; and (3) that the grantor was not a person who had the right to make a grant of both warams. In fact, both parties agreed before us that neither Ex. D nor the extracts from the other revenue accounts such as Exs. F, G, H, J, K and M throw any light on the question whether the original grant comprised the melwaram alone or included both the melwaram and the kudiwaram.

Coming to the actual evidence on record it is to be observed that there is no documentary evidence relating to the suit land prior to 1908 showing how the parties dealt with it or with each other and what rights they asserted or denied in regard to it. The year 1908 in which the first of the documents relied on by the plaintiff came into existence marks an important epoch in the history of land tenures in this presidency. It was in that year that the Madras Estates Land Act was passed and it actually came into force on the 1st July, 1908. The period is remarkable for a great awakening on the part of tenants all over the presidency, to their rights in general and to occupancy right in particular. Anticipating this legislative measure, several of the zamindars and large owners of landed property would seem to have attempted to secure cowles and muchilikas containing admissions of their absolute title from the tenants in occupation. The legislature was presumably aware of this move and therefore intervened by enacting section 51 (2) of the Act rendering stipulations in restraint of cultivation or of the harvesting by a ryot or for the giving up of the possession of the land at any specified time, void. Protection was also afforded to the tenants against the landlords making illegal exactions from the tenants. To this end, sections 135 and 136 were enacted. These provisions were, as indeed was the Act, intended to take effect only in the case of zamindaris and other large estates which fell

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1. (1926) 51 M.L.J. 510.   2. (1929) 30 L.W. 583.

within the Act. With regard however to land which is not an estate, the Court is left to appraise the value of the documentary evidence by applying the ordinary tests.

The earliest writing throwing light on the relationship between the parties is Ex. R called Bhilmaktha Khath dated 12th September, 1908. The expression only means that it is the counterpart of a lease with a fixed rent. Ex. R is a registered document and was executed by four members of the Khumbham family and by one of the Jannalagadda family in favour of certain members of the Putcha family of inamdars with whom half only of the original inam remained, the other half having been transferred to the Tangira family of the appellant as early as 1808. The land is described as sarvadumbala inam meaning an inam not subject to the payment of jodi or kattubadi. Under the khath the executants undertook to cultivate the land for a period of five years commencing from fasli 1318 and to pay to the inamdar every year two putties and ten tooms of kusma paddy. The following clause occurring in it is noteworthy :

"We shall not disturb the existing boundaries of the said land. At the expiry of the term, we shall not unless we obtain a cowle from you, cultivate the said land."

A clause of this kind cannot be said to be consistent with a permanent right of occupancy existing in the tenants. It may perhaps be ignored if it is proved *aliunde* that the tenant has such a right but not otherwise.

The next set of documents to be noticed consists of Exs. A and B, dated 26th September, 1912, and Ex. C dated 26th April, 1913. These are sale deeds by which the Putcha family sold their half share in the inam to the appellant's father, Tangirala Narasimham who thus became the sole owner of the entire inam. Reference is made in these sale deeds to the khath or cowle Ex. R and it is stated that after the period of the said cowle the purchaser should have the right himself to deal with the suit land according to his pleasure. On 20th December, 1912, some six months after the expiry of this khath the plaintiff's father issued the notice Ex. BB-3 to Kumbham Chalamayya *alias* Innayya, one of the executants of Ex. R, calling upon him to pay the amount due on certain promissory notes executed by him and others, obviously for arrears of rent, and to deliver the paddy rent due for fasli 1322. In this notice we find the statement :

"Moreover according to the terms of the cowle, you should plough seed beds at the close of the lease period and deliver possession of my land to me."

It is to be remarked that there is no such clause to be found in the lease deed Ex. R. This notice was apparently refused, for we find in Ex. Y-16 a fresh notice issued by Tangirala Narasimham on 14th June, 1913, the complaint that the tenants had entered upon the inam land without his permission in fasli 1322 and that they had refused to accept the notice said to have been issued in the month of December previous, obviously a reference to Ex. BB-3. The notice calls upon them to relinquish the land, refrain from effecting repairs to the ridges and not to enter upon the land thereafter. The contents of the notice indicate that the tenants were not amenable to the inamdar. The parties however appear to have come together and made up their differences, for we find on the 29th June, 1913, six bhilmakatha khaths, Exs. S toS-5, were executed in favour of the appellant's father by six sets of tenants each khath being for a period of five years. These khaths which were all registered contain the statement, not quite accurately translated in the print before us, that the inamdar fully possessed in the land leased all rights of title and enjoyment. The rents fixed in these khaths were an increase on the old rate by some $5\frac{1}{2}$ bags. Each one of the leases contains also the following further statement :

"Towards repairs to this land, you have this day paid me a sum of—(the figure varies in each lease). Therefore I shall, with the said amount, effect repairs to the ridges, etc., as directed by you, in fasli 1323. Every year you yourself shall pay the Government cists for this land. At the expiry of the term of this khath, I shall give up your aforesaid land to you."

The provision for the cost of the repairs to be borne by the inamdar coupled with the admission that he possessed full proprietary right in the land and the covenant on their part to quit at the end of the term are, if binding, destructive of the claim of occupancy right. What appears is that there was first a quarrel between the parties resulting in the refusal of the tenants to vacate the land, and it was patched up by the agreement by which the tenants in effect admitted that they had no occupancy right whatever. These khaths, Exs. S to S-5 expired on the 30th June, 1918. But even before this date however friction appears to have again started between the parties, for we find a series of notices, Exs. Y-1 to Y-7 dated 29th December, 1917, issued by the inamdar to the tenants. In these notices the inamdar complains that the rents were in arrears and calls upon the tenants to deliver the same within a week of the receipt of the notice and also to surrender possession of the land at the end of the fasli 1327. In default the inamdar threatened to institute a suit. Matters were patched up once again and the tenants executed Exs. S-6 to S-13 on the 18th June, 1918, this time, for a period of ten years. In these khaths the tenants expressly admitted that the inamdar possessed both the melwaram and the kudiwaram rights. The rents were also increased. The total of the rents payable for the first two years aggregated to $62\frac{1}{4}$ bags, for the next three years to 75 bags and for the last five years to 80 bags per fasli. The tenants committed default in paying the rents undertaken by them, and thereupon Exs. Y-8 to Y-15, notices dated 29th December, 1927, were issued by the plaintiff's father calling upon them to pay the arrears and also to quit and deliver possession of the land, and threatening to institute legal proceedings in default. Ex. Y is a similar notice dated 21st May, 1928. After death of the plaintiff's father in 1930 the plaintiff himself issued Exs. Z, Z-7 on 26th December, 1930 on the same lines as Ex. Y series. As before, the upshot was the tenants executed Exs. T to T-6 fresh khaths on 20th March, 1932, for the period of five years covered by faslis 1342 to 1346. The admission that the kudiwaram and the melwaram belonged to the inamdar was repeated and there was also an increase in the quantity of paddy rents, the total rent under these khaths bheing 87 bags

instead of 80 bags as under the previous khaths. The tenants undertook to surrender possession of the land at the expiry of the term. These khaths take us to 1936.

The year 1936 is important, for it was in that year that the Estates Land Act was amended by including in the definition of " Estate " all major inams. It is not at all improbable that this Act stirred up the tenants once again and made them put forward claims to occupancy rights which they had disclaimed during all the period from 1913 to 1932. They did not or would not see the distinction between major inams which fell within the Act and minor inams which did not. The impression appears to have persisted in the mind of the tenants even after the termination of the present suit, as evidenced by some of the written statements filed. On the 17th December, 1936, the plaintiff issued a series of notices to the several tenants in possession of the land. These notices are Exs. A-1 to A-7 and contain demands by the plaintiff that the defendants should deliver up possession of the land in their respective occupation by the end of fasli 1346, that is, by the 30th June, 1937 and also pay the arrears of the paddy rent due. The demands were not complied with, and the attitude of the defendants at this time was apparently determined by the belief that the Amending Act of 1936 had conferred rights of occupancy on them. The result was the institution of the present suit in October, 1937.

There are one or two other matters upon which there is some documentary evidence which may also be noticed. On the 19th March, 1934, the plaintiff issued a notice to one of the tenants, defendant 41, complaining that the latter had without the permission of the inamdar dug a pit in the land in his occupation and carried away some 25 cartloads of earth and that when the plaintiff objected the tenant agreed to close the pit, but that he failed to do so. The answer was Ex. W-1 dated 2nd April, 1934, by which the tenant replied that within ten days after the inamdar had left the place, the pit had been filled up. The plaintiff has also produced an account Ex U showing that his father had done earthwork and repairs to the suit land spending his own money. These two documents are not of much importance. As regards the repairs even if they were made at the expense of the inamdar, they do not carry the matter beyond what had been stipulated between the parties in Exs. S to S-5.

The *prima facie* effect of these documents is against the contention that the tenants have occupancy rights, and that all that the inamdar owns is only the melwaram. The learned Judge has however declined to place any reliance on them, because the executants were illiterate men and there is no direct evidence to show that the khaths were explained to them or that they understood the import of the recitals before they affixed their marks. Indeed, he thinks that the recitals in some of these documents which say that the melwaram and the kudiwaram rights were with the landlord show that they must have been made with an ulterior purpose. The learned advocate for the appellant complains and in my opinion rightly, that the Court below in rejecting these documents has ignored valuable evidence contained in registered documents extending over a considerable period which go far to support the rights claimed by the appellant. He urges that unless the defendants are able to establish that the khaths were executed by them as the result of fraud or undue influence, they cannot by merely saying that they are illiterate men get rid of them altogether.

It is necessary in this connection to refer briefly to the case of the defendants as made in the written statements, before referring to the evidence adduced at the trial. Only two of the written statements refer to the khaths in question and it is only in one of them, namely, the written statement of the first defendant that what may be regarded as a plea of fraud and undue influence has been put forward. The first defendant stated that the tenants never executed any khaths or leases, but that if any khaths are produced by the inamdar they are only papers which the village karnam had brought into existence taking advantage of the defendants " who are illiterates and ignorant of worldly affairs, being under his influence and doing as he dictated and which the defendants executed without knowledge of their contents and out of confidence." He added that the khaths alleged to have been executed and delivered by the various defendants are sham documents which have not been acted upon. We have here all the three possible pleas (1) denial of execution, (2) fraud and undue influence and (3) that the khaths were sham documents. So far as the last plea is concerned, it is entirely meaningless and does not appear to have been pressed. The first of these pleas that the khaths were not executed by the tenants has been abandoned because they are all registered documents. So that we are left with the plea of fraud and undue influence which alone has to be considered. The written statement of defendants 35 to 37 refers to the khath executed by their father, but these defendants contented themselves with stating that notwithstanding the khath, they have acquired rights of occupancy by force of the Amending Act (XVIII of 1936).

The first observation to be made on the plea of fraud and undue influence is that it is made in a vague form and without the necessary particulars. When issues came to be framed the defendants did not ask for an issue on this point and we find no issue has in fact been framed. P. W. 1 is the plaintiff himself and he is the person in whose favour, as I have said, the khaths Ex. T series were executed by the tenants. He deposed that he went to the suit village and brought the tenants to Masulipatam where the terms of the khaths were settled and tenants executed them. The cross-examination of this witness does not show that he was put any question about the alleged fraud and undue influence. P. W. 2 is an attestor of the khaths, Exs. S-6 to S-13. He deposed that these khaths were executed in the village and that the tenants agreed to the terms contained in them without any pressure or coercion. In cross-examination he stated that he was called in after the documents had been completed and he then attested them. P. W. 3 is an attestor of Exs. S to S-5. which he states were written at the house of the plaintiff's father at Masulipatam. He also stated that when he went to the place, the documents had been written up and after he went the thumb impression of the executants were taken. Beyond the fact that the tenants were illiterate men and that the two attest-

ing witnesses were not in a position to give any evidence as to what had happened between the parties before the actual execution of the documents, nothing further was suggested to these witnesses. Among the defendants only one went into the box, namely, the first defendant who was examined as D. W. 2. He stated that the tenants are illiterate men, that Karnam Venkataramayya got the documents Ex. T series executed and that they were not read over to them. He admitted that he himself executed a registered khath in favour of the plaintiff, but stated that the khath was not read over to him at the Registrar's office. On the evidence of this solitary witness it is impossible to uphold the plea of undue influence. The tenants may be illiterate men. But if it is a question of their executing a document more especially a document which was to be registered, it is very unlikely that they would have affixed their marks unless they had consciously assented to the terms and stipulations contained in it. It is a matter of common knowledge that tenants all over the presidency prize occupancy rights very much and they would never consciously put their signatures or marks to a document if they have the slightest suspicion that it contained anything against that right. There is nothing secret or sinister in the execution of these documents which were intended to be and were in fact registered. It is difficult to assume that the tenants attended the Sub-Registrar's Office and admitted execution on three different occasions and yet never knew that the khaths contained admissions against themselves. The very fact of registration must have put them on notice that the documents were obtained by the inamdar to secure himself against future disputes. The first defendant would say that there was enmity between the tenants and the Karnam Venkataramayya and that he it was who got the documents executed. From his cross-examination it would seem that the karnam is a person whose services were frequently requisitioned by the tenants themselves when they had to effect partition of their properties. The only reason alleged for the enmity is that they did not pay him the usual perquisites. In my opinion it is not safe to rely upon the interested evidence of the first defendant, the only witness called to prove the so-called fraud and undue influence.

The learned Subordinate Judge appears to be of the opinion that it is necessary for the plaintiff if he wants to rely upon these documents to show that they were explained to the tenants so as to make them understand their import before they were executed by them. For this proposition reliance is placed upon *Musammat Hubraju* v. *Chandrabali*[1] and *Omanhene Kwamin Bassayin* v. *Omanhene Bendentu* II[2]. The first of these cases related to a pardanashin lady in regard to whom it is well established that the burden of proof is on the party claiming under a document executed by her to prove that she executed it out of her free-will and with a knowledge of its contents. As the Privy Council observed in *Kali Baksh* v. *Ram Gopal*[3] :

"The law throws around her a special protection. It demands that the burden of proof shall in such a case rest not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to and was really understood by the grantor. In such cases it must also of course be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. The law as just stated is too well settled to be doubted or upset."

In the second of these cases their Lordships assented to the proposition that when a person not knowing English affixed his mark to a document in the English language the onus is upon the party relying on that document to establish that the document had in fact been properly explained and interpreted to the executant so as to make him understand its real import. Neither of these cases appear to be in point. We have not here a pardanashin woman nor a person who has executed a document in a language not known to him. On the contrary it is difficult to believe that all the three sets of khaths executed on different occasions covering a period of nearly twenty years after the tenants have had ample time and opportunity to know, learn and understand what they were doing, were brought about by the exercise of fraud or undue influence. It is not without significance that the first time when the inamdar took a khath was in 1908 after the passing of the Madras Estates Land Act and that the quarrels which led to the present suit arose in 1936 after the passing of the Amending Act of 1936. Indeed, the whole of the documentary evidence rather indicates that the tenants could not have believed that they had occupancy right when they executed the khaths and agreed to pay enhanced rents from time to time, and to surrender the land at the end of the term. Never during all these years—before suit, did any of the tenants suggest that they had been duped or coerced into executing the khaths now sought to be challenged.

Mr. Sitarama Rao the learned advocate for the respondents urged that in a conflict between the inamdar and his tenants on the issue of occupancy rights, much value should not be attached to these khaths which after all, he says, commenced only from the year 1908 and he relied upon observations contained in some of the reported cases. Before I refer to them, I may say that if there is independent proof that what was originally granted to the inamdar was only the melwaram or it is otherwise established that the tenants have the occupancy right, I should not pay attention to the admissions contained in the khaths, but where no such conclusion is possible I cannot agree that the khaths should be ignored altogether. It is to be observed that in this case, as in some of the cases which went up to the Privy Council, there is no proof that there were any tenants on the land at the date of the grant having rights of occupancy whether by custom or otherwise. In *Suryanarayana* v. *Patanna*[4], which was also a case of an inam granted by an ancient Reddi king, the question was whether the grant was of the melwaram only or included both the warams. Amongst the documents produced by the inamdar in support of his case, were muchilikas executed by tenants for specified terms and in

1. (1928) 111 I.C. 829.
2. A.I.R. 1937 P.C. 274.
3. (1913) 26 M.L.J. 121 : L.R. 41 I.A. 23 : I.L.R. 36 All. 81 (P.C.).
4. (1918) 36 M.L.J. 585 : L.R. 45 I.A. 204 : I.L.R. 41 Mad. 1012 (P.C.).

these muchilikas the tenants admitted that they had no jeroyati or occupancy right and they also agreed to surrender the lands at the end of the term. The tenants pleaded that if it were proved that such agreements of tenancy had been executed by them, such documents had been executed not willingly or with a knowledge of their contents. On this plea their Lordships remarked :

" If that statement meant anything it must have meant that the inamdars had by fraud and the exercise of undue influence procured the execution by the defendants or their predecessors of the agreements of tenancy under which the defendant held the lands occupied by them."

As there was nothing in the evidence to suggest any foundation of truth for the plea advanced by the tenants their Lordships dismissed it as unfounded. I am of opinion that the evidence in the present case is equally insufficient to make out that the khaths were brought into existence by undue influence or fraud. It is not to be forgotten that the inamdar in the present case is not by any means a powerful landed proprietor with the power and influence possessed say, by some of the Zamindars in this province. His status and position do not afford a basis for believing that he was in a position to dominate over his tenants.

Now coming to the cases relied on by Mr. Sitarama Rao and bearing on the value to be attached to documents of this type executed by tenants, in *Subbaraya Sastri* v. *Kristnaiya*[1] the inamdar sued to eject the tenants but failed to prove that the lands themselves had been originally granted in inam, or in other words, that the kudiwaram or any portion of it had been granted by way of inam. The learned Judges observed that there was no presumption that the predecessors-in-title of the defendants derived their title to the kudiwaram from the inamdar and that the onus was rightly thrown on the plaintiff to prove that he was entitled to eject the defendants. Muchilikas executed by the tenants were produced, in one of which the tenant had agreed that he would not touch the land without obtaining a fresh cowle and in another that he would at the end of the term while continuing to cultivate the land, not enter the land for purposes of cultivation till he had received a fresh cowle from the inamdar. Bashyam Aiyangar and Moore, JJ., observed that there was nothing in these documents inconsistent with aright of occupancy in the defendants. It will be observed that there was no stipulation there on the part of the tenant to quit and deliver the land to the inamdar at the end of the term such as we have here, and this was apparently the basis of the observation. In *Viswanatha Row* v. *Chinna Kolandai Nayanar*[2], which was a case relating to an inam grant by the Jagirdar of Arni, the plaintiff, the inamdar, sued to eject the tenants. Sadasiva Ayyar and Tyabji, JJ., held that there was a presumption that when an inam was granted by a Jagirdar or Raja to a Brahmin the grant was only of the melwaram. When the attention of the learned Judges was drawn to the terms of certain muchilikas executed by tenants by which tenants had agreed to quit and deliver the land, Sadasiva Ayyar, J., observed that such terms did not estop the tenant from setting up that he has kudiwaram rights in the absence of proof by the landlord that the tenant was originally let into possession of the land as tenant. He also held following the decision of Sankaran Nair and Tyabji, JJ., in *Narasimhacharyalu* v. *Ramabrahmam*,[3] that even as an admission, it should not be given too much weight in a dispute between a landlord and his tenant. This again is a case where the plaintiff was an inamdar under a grant from the Nuzvid Zamindar and the Court decided the case on the view that there was a presumption that an inam grant conveys only the melwaram right. On this ooting the learned Judges held that muchilikas containing the admission that the tenants had no occupancy right should be given no weight, more especially because such terms had been newly introduced and therefore had no sufficient weight to rebut the presumption. These cases were decided at a time when the prevailing notion was that there was a presumption that an inam grant conveyed only the melwaram interest and the observations are explicable on the footing that the tenants who were believed to possess a *prima facie* right to permanent occupancy, should not be deemed to have lost it by muchilikas of the kind. The latest case upon which reliance was placed is *Jagannadha Pillai* v. *Ramanatha Chettiar*[4], which related to one of the villages comprised in what is known as the Tanjore Palace Estate with regard to which it had been held in *Sundaram Ayyar* v. *Ramachandra Ayyar*[5] that the grant by the British Government conveyed the land revenue alone to persons not owning the kudiwaram right. The learned Judges expressed the opinion more or less the same that was expressed in *Zamindar of Parlakimedi* v. *Ramayya*[6]—that where an inamdar institutes a suit in ejectment and the origin of the tenancy is either unknown or the defendant was not let into possession by the inamdar, he must make out a case for a right to eject; he must establish that he is the owner of both the warams and that the defendant was let in under a terminable tenancy. Reference was then made to a muchilika which contained the recital that the tenants undertook to surrender possession on three months' notice and the learned Judges made the observation :

" It is familiar knowledge that covenants on the part of tenants to surrender possession were being introduced in muchilikas anticipating tenancy legislation ; and further, from the mere recital of such a covenant in a muchilika, it is not safe to presume the absence of occupancy right and it has always been held to be so."

The muchilika in question was a solitary one executed in the year 1885. But we have in the present case a different set of facts altogether, a series of muchilikas covering a very considerable period in circumstances which indicate that they were taken not before but after the Act of 1908, when, as I have said, there is reason to think that tenants all over the Presidency became conscious of their rignts. I am therefore unable to agree with the Subordinate Judge that these documents are to be rejected

1. (1924) 20 M.L.J. 526.
2. (1914) 1 L.W. 197.
3. (1913) 24 M.L.J. 656.
4. 1938 M.W.N. 1284.
5. (1917) 32 M.L.J. 333 : I.L.R. 40 Mad. 389 (F.B.).
6. (1926) 51 M.L.J. 510.

as unreliable or that they have no value with reference to the question under consideration. On the contrary I consider that they afford material upon which it should be held either that the landlord possesses both warams in the land or at any rate that they are sufficient to shift the burden on the tenants to prove occupancy right.

On the question whether apart from the plaintiff's failure to substantiate his right to eject the tenants, the tenants themselves have proved a right to the permanent occupancy of the land the respondents' learned advocate was not prepared to argue that the evidence on the record is sufficient to enable them to discharge the onus if it is held to be on them. The only evidence adduced by the defendants consists of the testimony of the first defendant. It may be taken as proved that the defendants and their ancestors have been in possession of the land for a very long time or even immemorially. It is not known when actually they came into possession. It may also be taken that till about 40 years back the suit land was enjoyed in six shares by two families, namely, the Kumbham family and the Jonnalagadda family. As the members of these families increased the lands appear to have been parcelled out among the several members who cultivated the land and paid the rent due to the inamdar. A part of the land also appears to have got into the possession of the daughter's sons of the family. The first defendant states that the lands were partitioned among the members of the family and that they treated it as land in which they had a right of occupancy. But the fact is that no partition deeds ever came to be executed, nor have there been any sales or mortgages in respect of any of these lands. Nor is there any proof of permanent improvement such as by digging wells, etc., made by the tenants. The rent paid by them have not been uniform. On the contrary from time to time the inamdar seems to have raised them. It was suggested that although the rents were raised the increases were never paid, but this is not correct as the first defendant himself admits that the inamdar filed suits for the arrears due and obtained decrees against them. He also admitted that in the suit in which he was a party he did not contend that he was bound to pay only three bags per acre which according to him is the customary rent. The learned Subordinate Judge's view that the tenants have proved that they possess the kudiwaram interest in the land cannot be sustained on the evidence. None of the circumstances which in the decided cases have been held to prove occupancy rights has been established in the present case. Considering the nature of the khaths executed by the tenants, the provision contained in them for the payment by the inamdar of charges for the repairs of the ridges, the fact that the rents have been raised from time to time and the fact that there is no proof of dealings by the tenants by sales, mortgages or otherwise, it seems to me that the only reasonable inference is that the tenants have failed to make out that they have any occupancy right in the land. In my opinion the appeal should therefore be allowed and the suit decreed with costs throughout.

*Horwill, J.*—The suit out of which this appeal arises was one in ejectment, and relates to an area in an inam village of just over 20 acres which was granted to the predecessors-in-title of the plaintiff by a grant, which has not been produced, of the year 1677 by one Bhanojee Suryaprakasa Rao at a time when the Moghuls were exercising authority over the country in which this land is situated.

The defendants belong to three families, the Kumbham family, the Jonnalagadda family, and the Merugumilli family. The Merugumilli family have been enjoying some of these lands because of their connection by marriage with the Kumbham family. So for practical purposes we may consider that the defendants are representatives of the Kumbham and the Jonnalagadda families. Of the suit lands, the greater part by far is in the possession of the Kumbham family, they cultivating 16.23 acres against 3.66 acres in the enjoyment of the Jonnalagadda family. These two families have been in enjoyment of the suit lands as long as memory or knowledge goes ; and there is no reason to think that at any time any person not belonging to one of these two families ever enjoyed any part of the suit lands. Whether some members of these families were in enjoyment of the lands even at the time of the grant we do not know ; but there is no reason to think that they came into possession after the grant. Up to the year 1908, no muchilikas seem to have been executed by the defendants or their ancestors in favour of the plaintiff or his predecessors-in-title ; but in that year, the landlord of a half of the lands leased that half to certain members of the Kumbham and Jonnalagadda families for a period of five years. Before 1913, the owner of that half came into possession of the whole of the land in question ; and from that year onwards, except perhaps for two years from 1928 to 1930, the tenants have been executing muchilikas in favour of the plaintiff in terms which would indicate that they had no occupancy rights. The learned Subordinate Judge held that the burden lay upon the plaintiff of proving that he had a right to eject the defendants ; and the facts that the land was granted to a non-resident Brahmin, that the members of those two families had been allowed to partition the land, that the partition had been recognised by the plaintiff and his father by looking to the individuals in possession of their shares of the land for the payment of the rents due from those shares, and that the defendants had never paid any enhanced rent despite the agreement to do so in the various muchilikas, proved that they had occupancy rights.

The question with which we have been most concerned in this appeal is whether the learned Subordinate Judge was right in holding that the burden was upon the plaintiff of proving a right to eject the defendants. There can be no doubt that the opinion had grown in this Court that it was necessary for landlords in suits in ejectment to prove not merely that they had let the defendants into possession; but also that they had the right to eject. It had also been held that where there was grant of land to a non-resident Brahmin there was a presumption in law that the grant was of the

melwaram only. Two decisions of the Privy Council, one in *Suryanarayana* v. *Patanna*[1], and another in *Venkata Sastrulu* v. *Seetharamudu*[2], held that there was no such presumption. When a case of a minor inam, such as we have in this case, came before a Full Bench of this Court in *Muthu Goundan* v. *Perumal Iyen*[3], the learned Judges had to consider whether in view of the decisions in *Suryanarayana* v. *Patanna*[1] and *Venkata Sastrulu* v. *Seetharamudu*[2], there was a presumption against a ryot. They came to the conclusion that although *Suryanarayana* v. *Patanna*[1] and *Venkata Sastrulu* v. *Seetharamudu*[2] had not definitely stated that the burden was upon the ryots, that inference must be drawn from the reasoning in those two cases. Coutts-Trotter, J., pointed out the practical difficulty if the burden were not thrown on the one party or the other ; for whereas in these cases the evidence is generally of a flimsy character, it would mean that whoever had first to seek the assistance of a Court would be defeated. He therefore thought that as *Suryanarayana* v. *Patanna* and[1] *Venkata Sastrulu* v. *Seetharamudu*[2] had made it clear that the burden in such cases was not on the landlord to prove that the grant was of both warams, it must be presumed that their Lordships were of opinion that the burden lay on the ryots of proving that both warams were not granted. A similar question came before the Privy Council in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[4] a case of a whole inam ; and their Lordships considered *Suryanarayana* v. *Patanna*[1] and *Venkata Sastrulu* v. *Seetharamudu*[2] and held that it was not laid down in those cases that the burden lay upon the ryots to prove that both warams were not granted to the landlord. Their attention was drawn to *Muthu Goundan* v. *Perumal Iyen*[3] and they held that the learned Judges were wrong in holding that there was any such burden on the tenant. From this it would seem fairly clear that the Privy Council were of opinion that there was no burden on either side, which would mean that the burden lay upon the plaintiff of proving his case. A later decision of the Privy Council however in *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[5] again introduced the uncertainty which *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[4], had seemed to resolve ; for it was clearly laid down in that case, which also related to a whole inam grant that the burden was upon the tenant. The uncertainty was made greater by the fact that although *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[4] seemed to have been referred to in the arguments before their Lordships there is no mention of that case in the judgment. *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[5] can be readily distinguished from *Sivaprakasa Pandara Sannadhi* v. *Veeerama Reddi*[4] on the facts of that case ; for in the latter case, the land had been granted to a temple and from the grant itself it was clear that both warams had been granted. Moreover the evidence showed that the temple had been enjoying a great part of the land by cultivating it through its own servants. As the ryots had been let into possession by the landlord, they could only have acquired occupancy rights by one of the methods indicated in the judgment. The difficulty in making this distinction between *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[5] and *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[3] lies in the fact that a very definite statement as to where the burden lies is found in a passage at the very beginning of the judgment, before their Lordships discussed the grant and the evidence and came to the conclusion that the plaintiffs had definitely established that there was a grant of both warams. That passage is :

> " It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant."

*Secretary of State for India in Council* v *Luchmeswar Singh*[6] and *Seturatnam Aiyar* v. *Venkatachala Goundan*[7] were referred to. In subsequent cases that came up before this Court some learned Judges have tried to reconcile these two cases, although it was held in *Ayanars* v. *Periakaruppa Thevan*[8] that the fact that *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[5] was later than *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[4] indicates that their Lordships in *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[5] dissented from *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[4] and that the later decision must therefore be considered to be good law and the earlier bad. In other Madras cases, however, there was a reluctance to conclude that the two decisions of the Privy Council could not be reconciled and that the later was meant to overrule the earlier, especially when *Naina Pillai Marakayar* v. *Ramanathan Chettia*[5] did not even mention *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[4]. The first Bench before which these two cases were cited was *Zamindar of Parlakimedi* v. *Ramayya*[9] in which Phillips and Madhavan Nair, JJ., discussed the case law on this subject and concluded that an attempt must be made to reconcile *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[5], and *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[4], and that the natural way of doing so was to consider *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[5], as referring to cases in which it had been made out that the grant was of both warams. They thought that in the passage above quoted from the early part of the judgment in *NainaPillai Marakayar* v. *Ramanathan Chettiar*[5], the word ' tenant ' had to be read in the stricter sense of persons who had been let into possession by a landlord and that it did not apply to tenants in the looser sense of the word as those in cultivation of the land,

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1. (1918) 36 M.L.J. 585 : L.R. 45 I.A. 209 : I.L.R. 41 Mad. 1012 (P.C.).
2. (1919) 37 M.L.J. 42 : L.R. 46 I.A. 123 : I.L.R. 43 Mad. 166 (P.C.).
3. (1921) 40 M.L.J. 429 : I.L.R. 44 Mad. 588 (F.B.).
4. (1922) 43 M.L.J. 640 : L.R. 49 I.A. 286 : I.L.R. 45 Mad. 586 (P.C.).
5. (1923) 46 M.L.J. 546 : L.R. 51 I. A. 83: I.L.R. 47 Mad. 337 (P.C.).
6. (1888) L.R. 16 I.A. 6 : I.L.R. 16 Cal 223 (P.C.).
7. (1919) 38 M.L.J. 476 : L.R. 47 I. A. 76 : I.L.R. 43 Mad. 567 (P.C.).
8. (1929) 30 L.W. 583.
9. (1926) 51 M.L.J. 510.

the origin of whose rights was not known. This explanation is attacked by the learned advocate for the appellant by referring to the words of Sir Lawrence Jenkins in *Sethuratnam Aiyar* v. *Venkatachala Goundan*[1], which dealt with a dispute between a pattadar and a ryot. His Lordship, in discussing the question of burden of proof, says :

"It was also admitted that the defendants held under, if not from, the plaintiff. To resist the plaintiff's claim the defendants set up a permanent tenancy or an occupancy right in themselves. If this was not established then the defendants must fail, and, to adopt the language of section 101 of the Evidence Act, as the defendants were bound to prove the existence of their permanent tenanc . or occupancy right, the burden of proof as to it lay on them."

The learned advocate stresses the words "held *under*, if not *from*, the plaintiff." It seems to me clear that in that case their Lordships had in mind a case—such as they had under consideration in the appeal before them—in which a person under a pattadar was claiming occupancy right. The person referred to in the following passage as an under-ryot can only mean a person holding under a ryot. In explaining how the evidence must be viewed, Sir Lawrence Jenkins said :

"Permanence is not a universal and integral incident of an under-ryot's holding ; if claimed, it must be established. This may be done by proving a custom, a contract, or a title, and possibly by other means."

It may be as well here, before discussing the later cases, to point out the distinction that has been drawn in the earlier Madras cases between the cultivators of ryotwari lands on the one hand and of inam lands on the other. The words of Sir Lawrence Jenkins quoted above are very similar to the language used with regard to the claims of an under-ryot in earlier Madras cases, especially in *Cheekati Zamindar* v. *Ranasooru Dhora*[2] and the cases on which that decision is based. In that case, Subramania Ayyar, J., referred to a decision of this Court in Appeal No. 1 of 1886 in which the distinction between the position of an underryot in a ryotwari land and a tenant under an inamdar was drawn. The passage from the earlier case quoted is :

"Admittedly, the village in suit is a taraf (ryotwari) village of which the temple is the registered proprietor entitled to both the melwaram and the miraswaram as against the appellant. This being so, the claim of an occupancy right as overriding the proprietor's right to cultivate his own land is of a special character, and as such, it is one which the party seeking to derogate from the ordinary incidents of property is bound to establish . . . . Ordinarily the mirasdar or proprietor in a taraf village has the right of cultivation also, and he is therefore at liberty to arrange for it from time to time either by granting leases or letting it to purakudies for varam or under what is usually called the pannai system by means of labourers who are paid wages in grain" ;

Subramania Ayyar, J., added :

"In other words, the view of the learned Judges was that permanent holdings under ryotwari proprietors being unusual and exceptional, the onus is on the party setting up such a special kind of holding."

He then went on to say with regard to the tenants of zamindari lands such as were under consideration :

"The *ratio decidendi* of the case seems to me to be rather in favour of the ryots in instances like the present for reasons already stated. Consequently, decisions in the cases which arose between ryotwari proprietors and cultivators under them are not in point in disputes like the present."

Mr. Sitarama Rao has quoted a long line of decisions of this Court in which it was consistently held that the burden lay upon the under-ryot to establish his occupancy rights, that line of decisions being departed from only in *Veeranan Ambalam Peria Kambalam Ambalam* v. *Annaswami Aiyar*[3] and *Venkatachala Goundan* v. *Rangaratnam Aiyar*[4] in which the learned Judges thought that the burden should be thrown upon the landlord in every case to prove his right to evict. It was these decisions which were held to be wrong in *Suryanarayana* v. *Patanna*[5] and *Venkata Sastrulu* v. *Seetharamudu*[6]. In *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar*[7], the same distinction between zamindari and ryotwari lands was pointed out ; and *Cheekati Zamindar* v. *Ranasooru Dhora*[2] was followed. In *Ponniah Nadan* v. *Deivanai Ammal*[8], *Cheekati Zamindar* v. *Ranasooru Dhora*[2] is again referred to with approval and *Veeranan Ambalam Peria Kambalam Ambalam* v. *Annaswami Aiyar*[3] and *Venkatachella Goundan* v. *Rangaratnam Aiyar*[4] which seemed to lay down a contrary view were discussed. The learned Judges said that on the facts in *Veeranan Ambalam Peria Kambalam Ambalam* v. *Annaswami Aiyar*[3], no exception could be taken to the decision ; but it was pointed that the *dictum* to be found at the end of *Venkatachalla Goundan* v. *Rangaratnam Aiyar*[4] seemed to carry the principle to a conclusion which was not warranted. There can be no doubt that in the Madras cases, the distinction between a ryotwari land and an inam land has generally been drawn ; but it is argued that in the Privy Council decisions discussed above—and in later decisions also—no such distinction has been drawn. There is no doubt that certain remarks found in those judgments give room for such criticism; but it has nevertheless been pointed out in cases arising out of suits by mirasdars against those holding under them, that a mirasdar is himself an occupancy ryot, that therefore it could not be expected that an under-ryot would have occupancy right, and that if he contended that he had, the burden would lie on him to prove it. In *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[9] after referring to the component parts in which a village may be

1. (1919) 38 M.L.J. 476 : L.R. 47 I.A. 76: I.L.R. 43 Mad. 567 (P.C.).
2. (1899) I.L.R. 23 Mad. 318.
3. (1911) 21 M.L.J. 845.
4. (1913) 24 M.L.J. 571.
5. (1918) 36 M.L.J. 585 : L.R. 45 I.A. 209 : I.L.R. 41 Mad. 1012 (P.C.).
6. (1919) 37 M.L.J. 42 : L.R. 46 I.A. 123 : I.L.R. 43 Mad. 166 (P.C.).
7. (1917) 34 M.L.J. 234.
8. (1918) 36 M.L.J. 463.
9. (1922) 43 M.L.J. 640 : L.R. 49 I.A. 286 ; I.L.R. 45 Mad. 586 (P.C.).

classified, their Lordships stated that the remarks did not apply to ryotwari tracts in the direct possession of Government which are let out to mirasdars or hereditary ryots for purposes of cultivation. At page 604 of the I.L.R. report *Seturatnam Aiyar* v. *Venkatachala Goundan*[1] is distinguished on that ground from the case before their Lordships. In view of this distinction which has always been held between ryotwari lands and inam lands it is unnecessary to refer to cases subsequent to *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[2] in which Division Benches of this Court have, in considering claims by under-ryots, held that the burden lies upon them of proving that they have occupancy rights. It may be mentioned that the decision in *Zamindar of Parlakimedi* v. *Ramayya*[3] was carried in appeal to the Privy Council; and the judgment of their Lordships is reported in *Krishna Chandra Gajapati Narayana Deo* v. *Ramanna*[4]. Unfortunately, the question of law discussed by the learned Judges of this Court was not referred to in the judgment of the Privy Council, where the question in dispute was treated as one of fact on which there had been concurrent findings in the Courts below. The respondents' learned advocate however attaches some importance to the fact that this attempt at reconciling *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[5] and *Naina Pillai Marakayar* v. *Ramanathan Chettir*[2], was not dissented from. *Subbarayudu* v. *Narasimha Rao*[6] is another case in which it was held that the right to eject must be established by the plaintiff; but in view of the way in which the question was discussed in that case, it does not seem that very much significance can be attached to this decision. In *Zamindar of Parlakimedi* v. *Ramayya*[3], the learned Judges thought that the decision in *Subbarayudu* v. *Narasimha Rao*[6] did not materially assist them in the considerations of the case that was before them. Much more pronounced and general views were however expressed in *Jagannatha Pillai* v. *Ramanathan Chettiar*[7] and there can be no doubt that the learned Judges were of opinion that the burden lay upon the landlord as plaintiff to establish his case that there was a grant of both warams. The value of this case is sought to be minimised by pointing out that the learned Judges said that the question had become academic in view of the recent inam legislation, that a Full Bench decision of this Court had held that all the grants in the Tanjore Palace Estate were of the melwaram only, and that therefore the remarks of the learned Judges with regard to the burden thrown on the inamdar are *obiter dicta*. Although the learned Judges were of opinion that the appeal before them might have been disposed of on these grounds, they did not rest their decision on these grounds or, at any rate, entirely on them; for they say:

"but assuming that the Full Bench decision cannot be taken to warrant its application to every village comprised in the Tanjore Palace Estate and each case must be decided on its facts, the question is, have the plaintiffs made out their case?"

They then go on to say:

"There is no presumption that an inamdar is owner of both the warams."

As against these decisions, the appellant reliefs on *Aiyanars* v. *Periakaruppa Thevan*[8], in which the plaintiffs were grantees of ryotwari lands. The apparent conflict between *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[5] and *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[2] is noted; but at once ignored on the ground that it is the latest case that binds thisCourt and it is that decision that must be followed Wallace, J., then dealt with the argument that a kudiwaramdar was not a tenant and said:

"even if it be held that 'tenant' does not cover one who is found to be cultivating under an overlord, unless the correct inference from the facts is that he was let into cultivation by that overlord that inference will follow in this case as in *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[2] from the absence of any evidence that at the time of the grant of the inam there were any tenants of land of the inam who had any right of permanent occupancy."

This statement would not have been possible if the learned Judge with whom Odgers, J., concurred, had not thought that *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[5] had been overruled; for in every case discussed by the learned Judge there was an overlord and a cultivator, and the statement in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[5], that there is no presumption either way would have no meaning if by the very relationship of the parties, the burden was necessarily on the cultivator. The learned Judges in *Aiyanars* v. *Periakaruppa Thevan*[8] never lost sight of the fact that they were dealing with ryotwari land of which the pattadar was the plaintiff, a temple. They say at page 591:

"It is no doubt true that cases can be found where Government ryotwari pattadars have kudiwaram tenants under them; (see *Veeranan Ambalam Peria Kambalam Ambalam* v. *Annaswami Aiyar*[9]); but the ordinary Government settlement operations under which pattas are issued are designated to ensure that the issue of settlement pattas is in accordance with actual ownership and occupation."

I do not think it necessary in this connection to discuss *Secretary of State for India in Council* v. *Luchmeswar Singh*[10] where the Government, who had claimed a permanent right of occupancy, had been let into possession of a village by a Rajah for a limited purpose; for later decisions have made it quite clear that a person let into possession must prove that he was granted or has acquired a permanent right of occupancy. There have been two Privy Council decisions, *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[2]. The first of them is *Subramania Chettiar* v. *Subramania Mudaliar*[11], which related to

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1. (1919) 38 M.L.J. 476 : L.R. 47 I.A. 76 : I.L.R. 43 Mad. 567 (P.C.).
2. (1923) 46 M.L.J. 546 : L.R. 51 I.A. 83 : I.L.R. 47 Mad. 337 (P.C.).
3. (1926) 51 M.L.J. 510.
4. (1932) 62 M.L.J. 221 (P.C.).
5. (1922) 43 M.L.J. 640 : L.R. 49 I.A. 286 : I.L.R. 45 Mad. 586 (P.C.).
6. (1924) 47 M.L.J. 558.
7. (1938) M.W.N. 1284.
8. (1929) 30 L.W. 583.
9. (1911) 21 M.L.J. 845.
10. (1888) L.R. 16 I.A. 6: I.L.R. 16 Cal. 223 (P.C.).
11. (1929) 57 M.L.J. 1 : L.R. 56 I.A. 248 : I.L.R. 52 Mad. 549 (P.C.).

ryotwari land and in which the argument in *Seturatnam Aiyar* v. *Venkatachala Goundan*, was followed. *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[2] was there distinguished, though not on the ground that it dealt with a whole inam; but on the ground that there was there sufficient material before the Court on which it was possible to come to a decision on the evidence without having recourse to the burden of proof. This case as well as the other Privy Council decisions have naturally been relied upon by the appellant as indicating that whatever may have been the case in the Madras decisions, the Privy Council have never drawn any distinction in principle between ryotwari and other land. That may be so; but as already pointed out, they distinguished in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[2], the case where the overlord had been proved to be a mirasdar, to whom the Government is presumed, in the absence of evidence to the contrary, to have granted occupancy rights. In *Ramayya* v. *Lakshminarayana*[3], a case of a whole inam, their Lordships say, following *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[2], that on the question whether the grant was one of melwaram only or of both rights there was no burden either way; but they held that as the plaintiff sought to oust the jurisdiction of the Civil Court by claiming that the land formed part of an estate, the burden lay on him, because of the provisions of section 9 of the Code of Civil Procedure and since, because the evidence in the case was scanty and the burden of proof lay on the plaintiff to show that the Civil Court had no jurisdiction, the suit had to be dismissed. This decision makes it clear that *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[2], is still good law and that the learned Judges in *Aiyanars* v. *Periakaruppa Thevan*[4], were wrong in ignoring it. If the burden had lain on the cultivator to prove that he had been granted the kudiwaram right or that he had acquired it subsequently, he would necessarily have failed, apart from any consideration that might arise from the construing of section 9 of the Code of Civil Procedure.

Both sides concede that the extracts from the various registers filed do not help us to decide whether the grant was one waram only or both. The plaintiff, examined as P.W. 1 deposed that the Putcha people (the family of the original grantees) were *vaidiki* Brahmins living in Dhantaloor in Guntur District and having no cultivation in the suit village. Although it is clearly impossible to prove positively that they were not living in the suit village at the time of the grant it seems improbable that they were. The plaintiff could, if he had pleased, have examined some members of that family, if in fact they had at any time lived anywhere other than in Dhantaloor. The second witness for the plaintiff admitted that the suit land was being cultivated by the defendants from time immemorial. Although there is no longer a presumption of law that a grant to a non-resident Brahmin is one of melwaram only, it has always been considered unlikely that a grant to a non-resident Brahmin would be of the kudiwaram also; for it was on account of that belief that this Court came gradually to hold that there was a presumption in law to that effect. In *Suryanarayana* v. *Patanna*[5] and *Venkata Sastrulu* v. *Seetharamudu*[6], it was held that there was no such presumption; but it is still permissible to regard this evidence that the grant was of melwaram only. That is made clear in *Seethayya* v. *Somayajulu*[7] where their Lordships say:

"The Brahmans represented by the grantee were learned Brahmans apparently not resident in the village granted, but resident about two miles away. This circumstance by itself is by no means conclusive. At the same time, it appears to their Lordships to make it more probable that the grant was in the nature of an endowment of revenue rather than of land for the purposes of cultivation."

It might be possible for a person resident only two miles away to attend to cultivation; but it would have been quite impracticable for anyone living in Dantaloor in Guntur District in 1677 to have done so. A further fact in favour of the tenants is that the evidence points to the fact that none but members of the Kumbham and Jonnalagadda families has been in possession of any of the suit lands; and it is not at all improbable that the enjoyment of the lands by these families is as old as the grant to the Putcha people, the predecessors-in-title of the plaintiff. The various partitions effected in the family have been recognised by the inamdars, as will be evident from Ex. Y series and Ex. S series, the former being notices to the tenants to pay arrears and the latter muchilikas. A comparison of the notices with the corresponding muchilikas makes this very clear. The learned Subordinate Judge has held that the rent paid by the tenants has always been the same and that although in muchilikas from 1913 onwards the tenants agreed to pay increased rent, yet they never in fact paid it. Although this can be spelt out of the oral evidence and may be true, this is not at all clear from the documentary evidence. As against these points in favour of the tenants that the grant was to a non-resident *vaidiki* Brahmin, that these two families have been enjoying this land from time immemorial, and that partitions have been made by the cultivators and recognised by the inamdar, the plaintiff, apart from the question of burden of proof, relies on the fact that from 1908 onwards the tenants have been executing muchilikas inconsistent with their claim to possess occupancy rights. If, in fact, the ryots had occupancy rights before 1908 they could not have lost them by executing muchilikas; so that the value of the muchilikas is by way of admissions on the part of the tenants rather as direct evidence that they did not possess occupancy rights. The plaintiff naturally attaches considerable importance to these admissions. The muchilikas of 1908, Ex. R, is perhaps not of very much significance, not only because it relates only to one half of the land, but because the terms are rather non-committal and of such a nature as has been held in some cases not to amount to an admission that the ryots did not possess occupancy rights. It is however,

1. (1919) 38 M.L.J. 476 : L.R. 47 I.A. 76 ; I.L.R. 43 Mad. 567 (P.C.).
2. (1922) 43 M.L.J. 640 : L.R. 49 I.A. 286 : I.L.R. 45 Mad. 586 (P.C.).
3. (1926) 52 M.L.J. 443 : I.L.R. 50 Mad. 595.
4. (1929) 30 L.W. 583.
5. (1918) 36 M.L.J. 585 : L.R. 45 I.A. 209 : I.L.R. 41 Mad. 1012 (P.C.).
6. (1919) 37 M.L.J. 42 : L.R. 46 I.A. 123 : I.L.R. 43 Mad. 166 (P.C.).
7. (1929) 56 M.L.J. 730: L.R. 56 I.A. 146 : I.L.R. 52 Mad. 453 (P.C.).

a fact of some importance that it was the year in which the Madras Estates Land Act was passed that the first muchilika was executed, which is an indication that the inamdar then became aware of the importance of documentary evidence. From 1913 onwards there can be no doubt that the ryots have by various muchilikas executed by them made admissions which are inconsistent with their claim to occupancy rights. The learned Subordinate Judge has accepted the evidence of the defendants that they had no idea of what was written in these muchilikas. The defence witnesses say, and the learned Judge accepted their evidence, that the karnam of the village, K. Venkataramiah, had written them on behalf of the inamdar and that he was responsible for introducing statements damaging to the defendants' claim which they, because they were illiterate, were unaware of. I am not prepared to disagree with these findings of the learned Subordinate Judge ; but even if we think it unlikely that the ryots continued to affix their thumb impressions to muchilikas without ascertaining through some neutral source what had been written, allowance must be made for the situation in which the tenants found themselves. It is always difficult for poor and ignorant ryots to fight an inamdar in a matter of this kind. It is quite impossible, unless they are all united and willing to embark on a prolonged litigation with abundant funds at their disposal to conduct that litigation. It is not therefore surprising that in very many cases ryots are contented with the substance of their rights by being allowed to remain in possession on the same rent or on some rent which is not greatly in excess of what they have been paying in the past. If the inamdar will do that, the ryots are often not unwilling to concede on paper the claims which the landlord is putting forward, without realising that these documents may at some future date be used against them to force them from the land which they and their ancestors have been enjoying from time immemorial.

To sum up, it seems to me that we are bound to follow *Zamindar of Parlakimedi* v. *Ramayya*[1] and *Jagannatha Pillai* v. *Ramanathan Chettiar*[2], in which it has been held by Benches of this Court that a burden lies upon an inamdar as plaintiff, of proving his right to evict. *Aiyanars* v. *Periakaruppa Thevan*[3], which holds the contrary view, cannot be followed; because the decision proceeds on the basis that *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[4], was overruled by *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[5]. That has been proved to be erroneous by the references to *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[4] in the later Privy Council decisions in *Subramanian Chettiar* v. *Subramania Mudaliar*[6] and *Ramayya* v. *Lakshmi Narayana*[7]. *Aiyanars* v. *Periakaruppa Thevan*[3] can moreover be distinguished because, like *Sethurathnam Aiyar* v. *Venkatachala Goundan*[8], it dealt with a grant of ryotwari land to a temple, in which it was definitely found that the kudiwaram right also was granted. It is true that none of the Privy Council cases deals expressly with a minor inam ; but *Muthu Goundan* v. *Perumal Iyen*[9], whose decision that the burden lay upon the cultivator to prove that the inamdar had not been granted both warams did. So *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[4] which held that *Muthu Goundan* v. *Perumal Iyen*[9] was wrong is a direct authority for the position that the burden does not lie upon the cultivator of a minor inam to prove that the inamdar was not granted both warams. If that be the case, then I have no hesitation whatsoever in holding that the mere fact of the execution of muchilikas with damaging stipulations from 1913 onwards would not be sufficient to discharge that onus.

If, contrary to what I believe to be the case, the burden is on the defendants, as tenants, to prove that the grantee was not given both warams, it would perhaps be difficult to say that the facts that the two families have been in enjoyment of the land from time immemorial and have had their partitions recognised by the inamdars, and that the grant was made to a non-resident Brahmin would be sufficient to discharge that onus.

A third position that may be taken is that as all the evidence is before the Court, it is immaterial on whom the burden lies. I am inclined to think that in this case, as in *Ramayya* v. *Lakshminarayana*[7] the evidence is not sufficient for the suit to be disposed of in this way ; but if it can be, I am of opinion that the three circumstances referred to immediately above are entitled to more weight than the admissions (assuming that the tenants knew the contents of the muchilikas) of ignorant and illiterate ryots.

In view of the above conclusions, I would dismiss the appeal with costs.

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As there has been a difference of opinion disclosed in the judgments just pronounced, we state under clause 36 of the Letters Patent the following points of law and fact:—

(1) Whether in a suit by a holder of a minor inam to eject the tenant from the holding, the burden is on the plaintiff to make out a right to evict by proving that the grant included both the melwaram and the kudiwaram interests or that the tenants or their predecessors were let into possession by the inamdar under a terminable lease or whether the burden is on the tenant to prove that they have occupancy rights ?

(2) Whichever way the burden lies, whether the burden has been discharged in the present case by the party on whom it lies ?

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1. (1926) 51 M.L.J. 510.
2. (1938) M.W.N. 1284.
3. (1929) 30 L.W. 583.
4. (1922) 43 M.L.J. 640 : L.R. 49 I.A. 286 : I.L.R. 45 Mad. 586 (P.C.).
5. (1923) 46 M.L.J. 546 : L.R. 51 I.A. 83 : I.L.R. 47 Mad. 337 (P.C.).
6. (1929) 57 M.L.J. 1 : L.R. 56 I.A. 248 : I.L.R. 52 Mad. 549 (P.C.).
7. (1934) 67 M.L.J. 1 : L.R. 61 I.A. 177 : I.L.R. 57 Mad. 443 (P.C.).
8. (1919) 38 M.L.J. 476 ; L.R. 47 I.A. 76 : I.L.R. 43 Mad. 567 (P.C.).
9. (1921) 40 M.L.J. 429 : I.L.R. 44 Mad. 588 (F.B.).

This appeal having been referred to a third Judge, on a difference of opinion (2—9—1943) between Krishnaswami Ayyangar and Horwill, JJ., coming on for hearing, the Court delivered the following

JUDGMENT.—This appeal arises out of a suit for ejectment filed by the inamdar of some 20 acres of land in the village of Lallagaruvu in the Kistna district against a large number of defendants who have resisted the suit on the ground that they have the right of permanent occupancy. The appeal has come to me under clause 36 of the Letters Patent, and the following two questions have been formulated for my decision :

1. Whether in a suit by a landholder of a minor inam to eject the tenants from the holding, the burden is on the plaintiff to make out a right to evict by proving that the grant included both the melwaram and the kudiwaram interests or that the tenants or their predecessors were let into possession by the inamdar under a terminable lease or whether the burden is on the tenants to prove that they have occupancy rights ?

2. Whichever way the burden lies, whether the burden has been discharged in the present case by the party on whom it lies ?

The appellant who is the inamdar, contends that the burden lies upon the defendants, and relies upon the authority of the Privy Council in *Naina Pillai Marakayar v. Ramanathan Chettiar*[1]. It will be necessary first to consider a number of decisions of the Privy Council which are relevant in this connection.

The first of these is *Suryanarayana* v. *Pattanna*[2]. The subject-matter of that case was an agraharam village. The ryots claimed rights of permanent occupancy under section 3 (2) of the Madras Estates Land Act, contending that the grant to the agraharamdar was of the land revenue alone. They relied upon a presumption that such a grant was so restricted. The Privy Council held that no such presumption existed in law. This proposition was re-affirmed in *Venkata Sastrulu* v. *Seetharamudu*[3], which also was concerned with the grant of an agraharam village.

These two decisions were considered by a Full Bench of this High Court in *Muthu Goundan* v. *Perumal Iyen*[4], which held that "although their Lordships of the Privy Council do not expressly lay down," in the two decisions " that there is a presumption in law that in inam grants both the melwaram and kudiwaram are included, such an initial presumption is deducible from the grounds on which these judgments are based." It was pointed out by the Privy Council in the next case—*Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[5] that this view was wrong and that each case must be dealt with upon its own facts, with special regard to the evidence and circumstances therein.

I now come to *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[1]. That case was a case of a village granted to a Hindu temple. The third paragraph of the judgment on page 344 runs as follows :

" The lands in respect of which a decree of ejectment has been made in each suit, are part of the village of Mangal in Tanjore, and are part of the endowed property of the temple. It is not disputed that the defendants were tenants of the temple lands, to which the suits relate ; nor is it now disputed that they received notices to quit. The defendants admit that the melwaram rights in the property in question are vested in the temple, but their case is that the kudiwaram rights in that property are vested in them and never were vested in the temple, and they claim that they have permanent rights of occupancy in the lands under section 6 of Madras Act I of 1908 and also independently of that Act."

Then immediately follows this enunciation of the law as to burden of proof :

" It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence, that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant. In *Secretary of State for India in Council* v. *Luchmeswar Singh*[6], it was held that the onus of proving that they had a permanent right of occupancy in lands was upon the defendants, who alleged it as a defence to a suit by their landlord to eject them and that proof of long occupation at a fixed rent did not satisfy that onus ; and in *Sethuratnam Aiyar* v. *Venkatachala Goundan*[7], in a suit by their landlords for the ejectment of the defendants from lands, in a ryotwari District in Madras, the giving of notice to quit not being disputed, it was held that hte onus of proving that the defendants had rights of permanent occupancy was upon them."

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1. (1923) 46 M.L.J. 546: L.R. 51 I. A. 83 : I.L.R. 47 Mad. 337 (P.C.)
2. (1918) 36 M.L.J. 585: L.R. 45 I.A. 209: I.L.R. 41 Mad. 1012 (P.C.)
3. (1919) 37 M.L.J. 42: L.R. 46 I.A. 123 : I.L.R. 43 Mad. 166 (P.C.)
4. (1921) 40 M.L.J. 429: I.L.R. 44 Mad. 588 (F.B.)
5. (1922) 43 M.L.J. 610: L.R. 49 I. A. 286 : I.L.R. 45 Mad. 586 (P.C.)
6. (1888) L.R. 16 I.A. 6: I.L.R. 16 Cal. 223 (P.C.)
7. (1919) 38 M.L.J. 476: L.R. 47 I. A. 76: I.L.R. 43 Mad. 567 (P.C.).

The fifth paragraph of the judgment then considers what a right of permanent occupancy is, and how it can be proved. In the sixth paragraph their Lordships say that they "will first consider whether the defendants have proved that they have rights of permanent occupancy under Madras Act I of 1908, and then whether they have proved that they have, otherwise than under that Act rights of permanent occupancy in the lands?" Their Lordships then proceed to discuss the evidence and to hold,

"(*i*) that the grant was of both melwaram and kudiwaram and therefore defendants could claim no right of permanent occupancy under the Act; and

(*ii*) that they had failed to prove any such right otherwise."

The final case dealing with an inam village is *Papuri Ramayya* v. *Putcha Lakshminarayana*[1] In that case the ryots claimed the benefit of a presumption that the grant was of the land revenue alone, but the Privy Council referred to *Suryanarayana* v. *Patanna*[2] as having laid it down that no such presumption existed in law, and proceeded to dispose of the case by holding that the burden lay upon the ryots to establish the terms of the grant, since it was they who challenged the jurisdiction of the Civil Court. It will be noted that their Lordships do not reach this decision by applying the law as laid down in *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[3], but I do not think *Papuri Ramayya* v, *Putcha Lakshminarayana*[1] can in any way be held to impair the authority of *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[3]. The decision in *Papuri Ramayya* v. *Putcha Lakshminarayana*[1] was against the ryots, and learned counsel for the respondent were not called upon for any argument.

After the decision of the Privy Council in *Naina Pillai Marakayar* v.*Ramanathan Chettiar*[3] had been published the question of burden of proof first came before a Bench of this High Court in *Zamindar of Parlakimedi* v. *Ramayya*[4]. There the inamdar claimed that the grant to him consisted of both warams, and he relied upon *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[3], as throwing the burden of proving that they had occupancy rights upon the ryots. It was held by both learned Judges (Phillips and Madhavan Nair, JJ.) in separate judgments that that was not the effect of *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[3]. They considered that if such were its effect, then *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[3], is wholly inconsistent with and must be taken to have overruled *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[5] and such a result, they held, would be impossible unless expressly formulated. The proposition in *Naina Pillai Marakayar* v. *Ramathan Chettiar*[3] as to burden of proof was therefore held to be limited to cases in which the right of the landlord to "the land itself," that is, to both warams was admitted or proved. In *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[3] as already indicated in this judgment, the result of the discussion of the evidence was to show that the landlord was the owner of both warams.

In *Aiyanars* v. *Periakaruppan Thevan*[6] however, a case decided three years later, and without reference to *Zamindar of Parlakimedi* v. *Ramayya*[4] another Bench of this Court (Odgers and Wallace, JJ.) took a different view. They were inclined to hold, though without any detailed discussion, that it was not easy to reconcile *Naina Pillai Marakayar* v. *Ramanathan Chettiar* with *Sivaparkasa Pandara Sannadhi* v. *Veerama Reddi*[5] but considered that *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[3] being later in point of time was binding upon them.

In *Jagannadha Pillai* v. *Ramanathan Chettiar*[7], Pandrang Row and Venkataramana Rao, JJ. held that the burden in a case such as this rests upon the inamdar and say that "there is nothing in the Privy Council decisions which militates against this view," but this decision on the question of the burden of proof seems to have been an unnecessary one for the disposal of the appeal before them, and there is no discussion of *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[3].

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1. (1934) 67 M.L.J. 1: L.R. 61 I.A. 177: I.L.R. 57 Mad. 443 (P.C.).
2. (1918) 36 M.L.J. 585: L.R. 45 I.A. 209: I.L.R. 41 Mad. 1012 (P.C.).
3. (1923) 46 M.L.J. 546: L.R. 51 I.A. 83: I.L.R. 47 Mad. 337 (P.C.).
4. (1926) 51 M.L.J. 510.
5. (1922) 43 M.L.J. 640: L.R. 49 A, 286; I.L.R. 45 Mad. 586 (P,C.).
6. (1929) 30 L.W. 583.
7. (1938) M.W.N. 1284.

Now the question for me to decide is whether *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[1] is binding upon this Court in the present case or not. Mr. Govindarajachari in a very able argument for the appellant contends that, whatever may be the practical difficulties involved in applying one or other of the two Privy Council decisions, there is no fundamental inconsistency between them. *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[1] deals with the wider issue raised by a claim to rights of permanent occupancy ; *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[2] deals with the narrower issue of the establishment of such rights by proof of one particular fact, namely, the subject matter of the original grant to the inamdar. The two issues may sometimes in practice be co-extensive, but they are not necessarily so, as it is always open to a ryot to prove, if he can that he has acquired a right of permanent occupancy otherwise than by proving that his landlord had no original title to the kudiwaram. I see no reason why this argument should not be accepted.

From the view of *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[1], taken by the learned Judges in *Zamindar of Parlakimedi* v. *Ramayya*[3], I must express my most respectful dissent. From the way in which the judgment in *Naina Pillai Marakkayar* v. *Ramanathan Chettiar* is constructed, and from the manner in which the paragraphs follow each other it seems to my mind beyond dispute that their Lordships have dealt with the whole of the evidence from the point of view of the necessity for the ryots positively to prove their claims to occupancy rights. Their Lordships state on page 344 as a matter not disputed that the ryots were tenants of the temple. They admitted that the temple had the melwaram rights, and claimed the kudiwaram rights for themselves. Immediately after the statement of the issue in the case comes the broad and general proposition that a " tenant of lands in India " must prove a right of permanent tenancy which he claims. No doubt their Lordships go on to cite in support of this proposition two previous decisions of the Privy Council which are distinguishable from the case of an inam grant before them, but in their sixth paragraph they do state, most definitely, that they will consider whether the defendants have proved that they have rights of permanent occupancy under the Madras Estates Land Act, which can mean on the facts of that case only whether they have proved that the lands which they were cultivating were part of an estate, which again can mean only whether in those lands the melwaram alone was granted to the inamdar. If their Lordships meant the doctrine as to burden of proof which they laid down in their fourth paragraph to apply only to cases where the landlord's title to both varams was already admitted or proved, then that paragraph was bound logically to come not before but after the decision of their Lordships on the evidence as to the terms of the grant. Whether *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[1], be held inconsistent with earlier Privy Council decisions or not, I cannot resist the conclusion that the proposition of law in the fourth praagraph is a general proposition of law which must be applied to a case such as the one now before me. The juxtaposition of the third and fourth paragraphs, and the language of the sixth show clearly that a tenant who admits a melwaram right in his landlord and claims an occupancy right in himself, must prove that right and that the Privy Council has not excluded such a tenant from the expression " tenant of lands in India."

I hold accordingly on the first of the points for my decision that the burden in the present case lay upon the defendants.

The second point now requires no more than a very brief discussion. It is common ground in this case that on the evidence adduced the defendants have failed to discharge the burden, and both the learned Judges who have heard the appeal agree that this is so. I accordingly find formally that the defendants have failed to discharge the burden which lay upon them.

In the result, this appeal must be allowed, and the appellant be granted a decree as prayed for with costs throughout.

V.S. ——— *Appeal allowed.*

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1. (1923) 46 M.L.J. 546: L.R. 51 I.A. 83: I.L.R. 45 Mad. 586 (P.C.) I.L.R. 47 Mad. 337 (P.C.).
2. (1922) 43 M.L.J. 640: L.R. 49 I. A. 286 :
3. (1926) 51 M.L.J. 510.

## [THE FEDERAL COURT OF INDIA.]

PRESENT:—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MOHAMMAD ZAFRULLAH KHAN, JJ.

Hulas Narain Singh .. *Appellant**

*v.*

Deen Mohammed Mian and others .. *Respondents.*

*Government of India Act (1935), section 208* (b)—*Leave to appeal to His Majesty in Council—Points of law not substantial and the subject of clear judicial pronouncements—Practice—Impropriety of direct approach to the Court outside the hearing and legal advice in relation thereto.*

Though the question raised in the litigation is one affecting a large number of people, both zamindars and tenants in a province, yet, if the points of law involved are by no means substantial and are the subject of clear judicial pronouncements, leave to appeal to His Majesty in Council against the decision of the Federal Court would not be granted.

The Federal Court looks to counsel at the hearing to put their client's case and direct approaches to the Court outside the hearing are most improper and quite useless and if it is done under legal advice, legal practitioners are acting most improperly in assisting in the preparation of or encouraging any such action on the part of lay clients.

In the matter of a petition for leave to appeal to His Majesty in Council under section 208 (*b*) of the Government of India Act, 1935, from the judgment of the Federal Court, dated the 15th April, 1943, in case No. 14 of 1942.

*Sardar Raghbir Singh* instructed by *Tarachand Brijmohanlal* for Appellant.

Respondent *Ex parte.*

The Court made the following

ORDER.—This is an application for leave to appeal to His Majesty in Council against the judgment of this Court in *Hulas Narain Singh and others* v. *Deen Mohammad Mian and others* (Case No. 14 of 1942).[1] The applicant, who is a zemindar of Bihar, instituted the original suit for recovery of rent from some of his ryots, on the footing that by the custom of the estate he was entitled to a half share of the produce by way of rent. In 1937, the Bihar Legislature had enacted section 178-B of their Bihar Tenancy Act, limiting the rent to nine-twentieths of the produce. The plaintiff contended that this provision was inoperative and *ultra vires* the Bihar Legislature. The contention was rejected by the High Court at Patna and by this Court also.

It is true that the question raised in the litigation is one affecting a large number of people, both zemindars and ryots, in the Province of Bihar. But the points of law are by no means substantial. The whole argument in support of the appeal was based upon the effect and implications of the Permanent Settlement; and this Court as well as the Courts in Bihar held that the Permanent Settlement had not deprived the Provincial Legislature of the power to enact measures calculated to regulate the rights and liabilities of landholders and ryots *inter se* in the Province. In support of the application, reliance was placed on the fact that leave to appeal had recently been granted to one of the Taluqdars of Oudh. The position there was different. The circumstances attending the settlement with the Taluqdars gave scope for certain contentions based on the Crown Grants Act and on the doctrine that the Crown cannot derogate from its own grant. No such contention is available in this case. There was also the fact that the questions there raised had so far not been dealt with in any judgment of their Lordships of the Judicial Committee. As regards the Permanent Settlement however, we have clear pronouncements. As early as 1874, their Lordships of the Judicial Committee explained that the expression "proprietor" had been used in the Permanent Settlement only as denoting the person who is directly liable to pay the revenue to Government; see *The Collector of Trichinopoly* v. *Lekkamani*[2]. The effect and implications of the Permanent Settlement were fully discussed by their Lordships in *Prabhatchandra Barua*

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* Case No. 48 of 1943. 1st December, 1943.

1. (1943) 6 F.L.J. 68 : A.I.R. 1943 F.C. 9.
2. (1876) L.R. 1 I.A. 282 (306) (P.C.).

v. *King-Emperor*[1]. This Court has dealt with the question not merely in this appeal, but also in *Hulas Narain Singh* v. *The Province of Bihar*[2]. As pointed out in the judgment sought to be appealed against, the power of the Legislature to enact measures for the protection and welfare of ryots and other cultivators was expressly referred to and reserved at the time of the Permanent Settlement itself. This application is accordingly dismissed.

We would add the following remarks :

After the last hearing before this Court and before judgment was delivered an attempt was made by the appellant to persuade the members of this Court to reconsider the case by forwarding direct to the Court further matter not brought to their notice by counsel arguing the case at the hearing. This action on the part of appellant appears to have been taken on legal advice. Again during the interval between the date when this application was heard and to-day, the appellant has approached members of this Court direct in the same way and apparently for the same purpose and again these approaches appear to have been made on legal advice. It is surely hardly necessary to state that this Court looks to counsel at the hearing to put their client's case and that direct approaches to the Court outside the hearing are most improper and quite useless and that if it has been done under legal advice legal practitioners are acting most improperly in assisting in the preparation of or encouraging any such action on the part of lay clients.

V. S. ——— *Application dismissed.*

## [THE FEDERAL COURT OF INDIA.]

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MOHAMMAD ZAFRULLA KHAN, JJ.

Keshav Talpade .. *Appellant**

*v.*

King-Emperor .. *Respondent.*

*Federal Court—Procedure as to appeal—Appeal against dismissal of* habeas corpus *application—Release of detenue prior to hearing of—Order to be passed on the appeal.*

Notwithstanding the dismissal by the High Court of an application for *habeas corpus* the detenue was released by Government prior to the hearing by the Federal Court of the appeal against the dismissal. Nevertheless the appellant sought a pronouncement of the Federal Court on the correctness of the High Court's judgment.

*Held*, that such a course could not be adopted and that all that could be done at that stage was to dismiss the appeal on the ground that no order on the application could be made.

Appeal from an order of the Bombay High Court dated 2nd July, 1943, in Criminal Application No. 86 of 1943.

*G. N. Joshi* (*D. P. Dhupkar* with him) instructed by *R. G. Naik*, Agent, for Appellant.

*N.P. Engineer* (Advocate-General of Bombay) (*M. M. Desai* with him) instructed by *B. Banerjee*, Agent, for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—This appeal arises out of an application for a writ of *habeas corpus* made by the appellant to the Bombay High Court in February, 1943. The matter had come before this Court on two previous occasions in April and May, 1943, but the orders of this Court on those occasions did not finally dispose of the matter. By its order dated 2nd July, 1943, the High Court (by a majority judgment) dismissed the application and this appeal has been preferred against that order.

The appellant takes exception to the grounds on which the High Court has rested its judgment, including its view as to the effect of the orders of this Court. But it is admitted that the appellant has already been released. This appeal was filed on the 10th August, and it is stated by the Advocate-General of Bombay that the appellant was released on that very day, though it is not quite clear whether the

1. (1930) 59 M.L.J. 814: L.R. 57 I.A. 228 : I.L.R. 58 Cal. 430 (P. C.).

2. (1942) 1 M. L. J. 607 : 5 F.L.J. 1 : I.L.R. 21 Pat. 521.

*Case No. 31 of 1943. 2nd November, 1943.

order of release was passed on that date or the appellant was in fact set free on that date. As the appellant is no longer in custody, his learned counsel admits that no order can hereafter be made on the *habeas corpus* application ; but he nevertheless asks us to pronounce an opinion on the correctness of the High Court's judgment. We do not see our way to adopt any such course. All that can be done at this stage is to dismiss the appeal on the ground that no order on the application can now be made.

V. S. ——— *Appeal dismissed.*

## [THE FEDERAL COURT OF INDIA].

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MOHAMMAD ZAFRULLA KHAN, JJ.

The Bank of Commerce, Limited .. *Appellant**

*v.*

Amulya Krishna Basu Roy Chowdhury .. *Respondent.*

*Constitutional Law—Government of India Act (1935), section 10—Provincial enactment bearing on subject exclusively reserved to the Central Legislature if rendered invalid thereby—If Central and Provincial Act on the same subject, can both be* intra vires*—Conflict in such cases—Doctrine of repugnancy and not* ultra vires *applies—Bengal Moneylenders Act (X of 1940)—If* intra vires *the Provincial Legislature—Absence of necessity to invoke the rule of severability—Section 36 (2)* (a)*—Scope of power to reopen decree.*

The mere fact that a provincial enactment may contain provisions bearing upon a subject exclusively reserved to the Central Legislature will not suffice to invalidate the provincial enactment. Subjects which in one aspect and for one purpose fall within the powers of the Provincial Legislature may in another aspect and for another purpose fall within the powers of the Central Legislature. It is quite possible that particular Acts of the Provincial and Central Legislatures, though on the same subject, may each be *intra vires* the particular legislature when regarded from different aspects thereof.

When there is a conflict between the provisions of two such Acts it is the doctrine of repugnancy and not the doctrine of *ultra vires* that has to be applied.

On the contention that the Bengal Moneylenders Act was *ultra vires* the Provincial Legislature inasmuch as it contained provisions affecting promissory notes which it had no authority to enact,

*Held*, that judged by the above tests, the Bengal Moneylenders Act must, taken as a whole, be held to fall within the description, legislation in respect of " money-lending and money-lenders," a subject within the exclusive competence of the provincial legislature (Entry No. 27 in List II, Seventh Schedule). The fact that among the documents on which moneys may be lent, promissory notes form an important class will not justify the view that the regulation and control of money-lending have to that extent been taken out of the purview of provincial legislation.

It is unnecessary to invoke the rule of severability to uphold the validity of the impugned Act where the problem can only be one of conflict between the provisions of the local law and the provisions of the central enactment, each being *intra vires* the particular legislature.

Section 36 (2) (*a*) of the Bengal Moneylenders Act does not relegate parties to their rights and liabilities on the original cause of action. The decree is reopened only to the extent necessary to substitute the method of account taking sanctioned by the Act in place of the calculation on which the original decree was passed.

*P. R. Das* and *P. C. Basu*, Senior Advocates, Federal Court (*S. C. Dutt*, Advocate, Federal Court, with him), instructed by *Ganpati Rai*, Agent, for Appellant.

*Sir B. L. Mitter*, Advocate-General of India, (*K. K. Basu*, Advocate, Federal Court, with him), instructed by *P. K. Bose*, Agent, for Respondent.

*S. M. Bose*, Advocate-General of Bengal (*B. Das*, Advocate, Federal Court, with him), instructed by *B. Banerjee*, Agent, for the Province of Bengal.

The Judgment of the Court was delivered by

*The Chief Justice.*—These appeals arise out of applications made by two judgment-debtors for relief under section 36 of the Bengal Moneylenders Act, 1940. The appellant's predecessor in title had obtained small cause decrees against the respondents in 1933 and 1938 respectively and certain payments had been made towards them. On August 30 and September 1, 1941, the judgment-debtors applied to the Court to reopen the decrees, scale down the debts and direct refund of amounts that might be found to have been overpaid on taking accounts according to the provisions of the Act. To these claims the appellant Bank raised various objections, but they were overruled by the Subordinate Judge and the judgment-

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* Cases Nos. 1 and 2 of 1943. 8th December, 1943.

debtors were awarded small amounts by way of refund. The Bank took the matter on revision to the High Court at Calcutta, on the plea that the decrees had been obtained on "promissory notes" and that the Provincial Legislature had no authority to enact measures affecting promissory notes. This contention was overruled by the High Court on the authority of a Full Bench decision of that Court (*Harsukdass Balkissendas* v. *Dhirendra Nath Roy*[1]). That Full Bench judgment was based on the decision of this Court in *Subramaniam Chettiar* v. *Muthuswami Goundan*[2]. The *ratio decidendi* in that case was that similar provincial legislation in pith and substance related to "money-lending and money-lenders" (Entry No. 27, List II of the Seventh Schedule) and that any argument based on the exclusion of promissory notes from the sphere of provincial legislation would not avail in cases where claims under promissory notes had merged in decrees made before the commencement of the provincial Act. On all material facts, these cases very closely resemble *Subramaniam Chettiar* v. *Muthuswami Goundan*[2] and if, that decision is applicable here, these appeals must fail. Counsel for the appellant has accordingly attempted to distinguish that case with reference to certain differences in the provisions of the two provincial enactments. We have to decide whether these differences make any difference to the result.

The Bengal Moneylenders Act is, like the Madras enactment which was the subject-matter of *Subramaniam Chettiar* v. *Muthuswami Goundan*[2], part of a scheme to relieve agricultural indebtedness in the various provinces of this country, but the enactments passed in the different Provinces have not all adopted the same lines. The Bengal Act begins with a comprehensive definition of the words "loan" and "lender", but excepts certain kinds of loans from the operation of the Act by taking them out of the definition. It makes detailed provisions for the registration and licensing of money-lenders and for the accounts to be maintained by them. The relief intended to be afforded by the Act is provided for in Chapters VI and VII. Chapter VI fixes maximum rates of interest recoverable on loans and the total amount recoverable for interest and principal in respect of any loan. Chapter VII, of which section 36 forms part, provides for the reopening of settlements and of decrees of Courts in certain circumstances and for other ameliorative orders. The portion of the definition section relevant to the present case runs as follows :

"Loan means an advance, whether of money or in kind, made on condition of repayment with interest and includes any transaction which is in substance a loan, but does not include * * :

(*e*) an advance made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881, other than a promissory note."

Among the relieving provisions, the relevant clauses are sub-sections (1) and (2) of section 36. Sub-section (1) gives the Court power to reopen transactions "in any suit to which this Act applies" and by the definition clause this expression includes not only suits instituted after the first day of January, 1939, and suits pending on that date, but even suits already disposed of, unless proceedings in execution of decrees passed therein had also been completed by that date. *See also* proviso (*ii*) to section 36 (1). Sub-section (2) of section 36 provides that if in the exercise of the powers conferred by sub-section (1) the Court reopens a decree, it shall "pass a new decree in accordance with the provisions of this Act."

Comparing the above provisions of the Bengal Act with the corresponding provisions of the Madras Act, three points of difference were emphasised by counsel for the appellant :

(*a*) While the Madras Act contained no clear indication as to whether it was intended to affect promissory notes or not, the Bengal Act, by excluding promissory notes from exception (*e*) to the definition of loan, has clearly shown an intention to legislate in respect of promissory notes.

(*b*) While section 19 of the Madras Act was in terms limited to decrees passed before the commencement of the Act, the Bengal Act made provision by the same section for decrees passed before the commencement of the Act as well as decrees passed after the commencement of the Act.

1. I.L.R. (1941) 2 Cal. 107 : 4 F. L. J. H. C. 308.

2. (1941) 1 M.L.J. (Suppl.) 1: (1940) F.C.R. 188 : 3 F.L.J. 157.

(c) While section 19 of the Madras Act did not contemplate a *reopening* of the decree (but only its amendment), the Bengal Act expressly provided for the reopening of the decree and the passing of a new decree.

Stress was laid on these three points of distinction with particular reference to certain observations contained in the judgments in *Subramaniam Chettiar* v. *Muthuswami Goundan*[1].

Distinction (a) was represented as vital. It was contended that in *Subramaniam Chettiar* v. *Muthuswami Goundan*[1], the Court repelled the contention as to the total invalidity of the Act only on the ground that the general language of the Madras Act could, by the application of the principle of *Macleod's case*[2], be so read as not to comprehend promissory notes within its scope. Whereas in the present case, the Provincial Legislature has shown a deliberate intention to deal with promissory notes as well, it was contended that such legislation was an attempt to trespass upon the exclusive field of the Federal Legislature (Entry No. 28 of List I) and as such *ultra vires* the Provincial Legislature. It was also contended that as this provision was not an independent and severable provision, but part and parcel of the scheme of the Act worked out on the basis of the general definition of the term "loan," the doctrine of severability of the valid from the invalid provisions could not be pressed in aid and that the whole enactment must therefore be held to be void. The Advocate-General of India and the Advocate-General of Bengal suggested by way of answer to this argument that the provisions of the Bengal Moneylenders Act, even in their application to promissory notes, did not on their proper construction affect the rights of holders in due course under the Negotiable Instruments Act, but only the rights of the immediate parties to the instrument and that this was only a matter of "contract" (Entry No. 10 of List III of the Seventh Schedule). In support of this argument reliance was placed on sections 29 and 36 (5) of the Bengal Act. The interpretation of these sections is not by any means free from difficulty and as there are other objections to be considered in connection with this line of argument, we prefer not to base our conclusion on it.

Assuming that the Bengal Act affects and was intended to affect righs and liabilities based on promissory notes, it does not seem to us necessarily to follow that the Act must be wholly void as *ultra vires* the Provincial Legislature. In *Subramaniam Chettiar* v. *Muthuswami Goundan*[1], this Court discussed at some length the applicability of the principles laid down by the Judicial Committee in the Canadian cases to the interpretation of the Indian Constitution Act. According to those cases, the mere fact that a provincial enactment may contain provisions bearing upon a subject exclusively reserved to the Dominion Legislature will not suffice to invalidate the provincial enactment. The other considerations which are relevant to this question have been adverted to in the judgments in *Subramaniam Chettiar* v. *Muthuswami Goundan*[1], but as the effect of the decisions of the Judicial Committee has been summarised in Lefroy's Treatise on Canadian Constitutional Law, it would be convenient to quote from that Treatise. In section 8 (on page 80) the author observes that the absence of concurrent powers of legislation over certain subjects "must not be understood as meaning that if a given Act is *intra vires* of the Dominion Legislature, a precisely similar Act could under no circumstances be *intra vires* of a Provincial Legislature. For, as we shall see (*infra* page 98), subjects which in one aspect and for one purpose fall within the provincial powers of section 92 may in another aspect and for another purpose fall within section 91 . . . . It seems quite possible that a particular Act, regarded from one aspect, might be *intra vires* of a Provincial Legislature and yet regarded from another aspect might be also *intra vires* of the Dominion Parliament. In other words, what is properly to be called the subject-matter of an Act may depend upon what is the true aspect of the Act." As a footnote to this statement, the author refers to certain early Canadian cases to show that an Act respecting bills of lading might be passed by a Provincial

1. (1941) 1 M.L.J. (Supp.) 1 : (1940) F.C.R. 188 : 3 F.L.J. 157.
2. (1891) A.C. 455.

Legislature as a matter relating to property and civil rights, while the Dominion parliament might pass a similar Act as a necessary or convenient matter to be dealt with in the regulation of trade and commerce. In section 19 (on page 95), he further observes :

"Whatever powers the Provincial Legislatures have as included within the enumerated subject-matters of section 92 when properly understood, those powers they may exercise, although in so doing they may incidentally touch or affect something which might otherwise be held to come within the exclusive jurisdiction of the Dominion Parliament under some subject-matter enumerated in section 91."

In section 21 (on page 98), the author refers again to the distinction founded on difference in aspects of legislation and observes :

"The cases which illustrate this principle show, by 'aspect' here must be understood the aspect or point of view of the legislator in legislating, the object, purpose and scope of the legislation. The word is used subjectively of the legislator rather than objectively of the matter legislated upon."

Judged by these tests, the Bengal Money-enders Act must, taken as a whole, be held to fall within the description, legislation in respect of "money-lending and money-lenders," a subject within the exclusive competence of the Provincial Legislature. (Entry No. 27 in List II). As pointed out in *Subramaniam Chettiar's case*[1], the fact that among the documents on which moneys may be lent, promissory notes form an important class will not justify the view that the regulation and control of money-lending have to that extent been taken out of the purview of provincial legislation.

The further question may no doubt still arise as to what is to happen in the event of a conflict between provisions contained in a provincial enactment so far as they bear upon promissory notes and provisions relating thereto contained in a central enactment. Certain aspects of this question have been adverted to in *Subramaniam Chettiar's case*[1], and the difficulty of applying section 107 of the Constitution Act to solve the conflict, so far as such conflict may arise out of central legislation bearing on List I subjects, but passed before 1935, has also been pointed out. Even if, as suggested by Sulaiman, J., in that case, it should be held that such conflict should be resolved by an extension of the principle of section 107 by analogy or by the application of the Canadian doctrine of the "occupied field," that would not help the appellant in the present cases. That line of argument would not support the plea of *ultra vires*, but would only bring in the principle of repugnancy, that is, in the event of and in so far as there is a conflict between provincial legislation and central legislation, the latter shall prevail. In the present cases we are not concerned with the rights of parties under a promissory note. Here, as in *Subramaniam Chettiar's case*[1], their rights and liabilities had merged in decrees even before the passing of the Bengal Moneylenders Act, and, subject to the observations to be made when dealing with points (*b*) and (*c*), the principle of that decision is equally applicable.

In this view, it is not necessary to refer at length to the arguments urged or authorities cited on the question of the severability of the invalid provisions of an Act from the valid provisions. The question will be material only if the Act is in some measure held to be *ultra vires* the Provincial Legislature. Where the problem can only be one of conflict between the provisions of the local law and the provisions of a central enactment, each being *intra vires* the particular legislature, it is unnecessary to invoke the rule of severability to uphold the validity of the impugned Act. Language has sometimes been employed in enunciating the doctrine of "occupied field" which may seem to suggest that in respect of a field occupied by central legislation, the Provincial Legislature would have no power at all to deal with the subject. But having considered all the decisions bearing on that question, in our judgment it is the doctrine of repugnancy and not the doctrine of *ultra vires* that has to be applied in this class of cases.

Distinction (*b*)—as to the wide terms of the Bengal Act covering both decrees passed before the Act and decrees passed after the Act—was emphasised in view

1. (1941) 1 M.L.J. (Supp.) 1 : (1940) F.C.R. 188 : 3 F.L.J. 157.

of an observation in *Subramaniam Chettiar's case*[1]. It was there said that it might be necessary to draw a distinction between decrees passed on promissory notes before the commencement of the Act and decrees passed after the commencement of the Act, because in the latter case the Act might in substance interfere with rights which, at or after the date of its commencement, were only rights under promissory notes. This question, again, might assume some importance if the existence of provisions relating to promissory notes would have the effect of rendering the provincial enactment invalid. If however the operation of such provisions is only to be determined by the application of the doctrine of repugnancy, the circumstance that one and the same section provides for both kinds of decrees cannot affect the decision of the present cases, where admittedly the decrees had been passed before the Act came into operation.

Distinction (c) does not, in our opinion, amount to more than a verbal distinction. We do not understand section 36 (2) (*a*) as relegating the parties to their rights and liabilities on the original cause of action. The decree is reopened only to the extent necessary to substitute the method of account-taking sanctioned by the Act in place of the calculation on which the original decree was passed.

We are accordingly of the opinion that these points of difference between the Bengal Act and the Madras Act do not warrant the conclusion that the present case differs in any essential respects from *Subramaniam Chettiar's case*[1]. The appeals accordingly fail and are dismissed with costs (Counsel's fee only in one case). According to the usual practice, there will be no order as to costs in favour of the Advocate-General of Bengal who intervened.

V.S. *Appeals dismissed.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Udayammai Achi and another .. *Appellants**

*v.*

Umayal Achi and others .. *Respondents.*

*Hindu Law—Joint family—Manager—Minor represented by guardian* ad litem—*Power of manager to alienate for family debt—civil Procedure Code (V of 1908), Order 32, rule 7—Scope.*

Rule 7 of Order 32 of the Civil Procedure Code applies to the guardian or next friend in the suit, and when the father or manager of the family is not the guardian or next friend of the minor his powers are unaffected. As it is the bounden duty of the manager to pay the debts of the family out of the family assets he can dispose of the interests of coparceners who happen to be minors.

*Ganesha Row* v. *Tuljaram Row*, (1913) 25 M.L.J. 150 : L.R. 40 I.A. 132 : I.L.R. 36 Mad. 295 (P.C.); *Ramalingam Chetty* v. *Radhakrishnan Chettiar*, (1935) 70 M.L.J. 700 and *Marwadi Vannaji* v. *Ranga Rao*, (1937) 1 M.L.J. 384, considered.

Appeals against the decrees of the District Court, West Tanjore at Tanjore, dated 30th December, 1941 and passed in O. S. Nos. 10 and 11 of 1940.

*K. Rajah Aiyar* and *K. Srinivasan* for Appellants.

*T. V. Muthukrishna Aiyar* and *R. Gopalaswami Aiyangar* for Respondents.

The Judgment of the Court was delivered by

*The Chief Justice.*—These appeals raise the question which was left open by the Privy Council in *Ganesha Rao* v. *Tuljaram Rao*[2], namely, how far the act of a managing member of an undivided Hindu family may affect a party to a suit represented by another person as his next friend or guardian *ad litem.*

A Nattukottai Chettiar named Udayappa Chettiar had three sons, Raman, Kasi Viswanathan and Chellappa. Raman married Alagammai Achi, the appellant in Appeal No. 260 of 1942. He predeceased his father. Kasi Viswanathan married Umayal Achi, the first respondent in Appeal No.259 of 1942 and the only respondent in Appeal No. 260 of 1942. Chellappa married one Unnamalai Achi. He became

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1. (1941) 1 M.L.J. (Supp.) 1 : (1940) F.C.R. 188 : 3 F.L.J. 157.

2. (1913) 25 M.L.J. 150: L.R. 40 I. A. 132: I.L.R. 36 Mad. 295 (P.C.).

* Appeals Nos. 259 and 260 of 1942. 3rd December, 1943.

of unsound mind and was represented in certain execution proceedings to which reference will be made in a moment by Unnamalai Achi as his guardian *ad litem*. On Umayal Achi's marriage with Kasi Viswanathan her stridhanam was invested in her father-in-law's firm. In O. S. No. 1693 of 1931 of the Chief Court of Pudukottah, Umayal Achi sued her father-in-law, her husband, her brother-in-law Chellappa and Vellayya (the son of Raman) to recover her stridhanam moneys. Udayappa Chettiar died during the pendency of this suit. On the 29th April, 1933, a decree was passed in favour of Umayal Achi for Rs. 45,795-1-0. The decree was subsequently transferred for the purpose of execution to the District Court of West Tanjore. In E. P. No. 61 of 1934, Umayal Achi attached a mortgage held by the family. Subsequently Vellayya's one-third interest in the mortgage was released, leaving the interests of her husband and Chellappa. By this time Chellappa had become insane and it was in these proceedings that his wife Unnamalai Achi was appointed his guardian *ad litem*. The sale of their interests in this mortgage was fixed for the 16th March, 1936, but Kasi Viswanathan obtained a postponement until the 19th March, 1936. The next day he assigned his own one-third interest to his wife in part satisfaction of her decree and on the 18th March he assigned as the manager of the family, Chellappa's one-third interest. These mortgage interests were not sufficient to satisfy Umayal Achi's decree in full and on the 19th March, 1936, partial satisfaction was entered up. There can be no doubt that in arranging for the postponement of the sale and in making these assignments in partial satisfaction of the decree Kasi Viswanathan was helping his wife to avoid any claim for rateable distribution by other creditors.

In O. S. No. 537 of 1933 of the Chief Court of Pudukottah Alagammai Achi, Raman's widow, filed a suit against the members of the joint family to recover her stridhanam, which had also been invested in the family business. On the 11th July, 1936, she obtained a decree for Rs. 1,70,000.

In O. S. No. 1450 of 1933 of the same Court, Udayammai Achi, a creditor of the family, sued to recover what was due to her and on the 20th January, 1936, she obtained a decree for a sum of Rs. 27,000. This decree was likewise transferred for execution to the District Court of West Tanjore and on the 16th March, 1936, she obtained an order for attachment of the same mortgage rights. The attachment was effected on the 17th April, 1936. In the meantime the assignment to Umayal Achi had taken place.

In E. A. No. 303 of 1936 Umayal Achi applied for the removal of the attachment which Udayammai Achi had obtained. This application was successful and consequently led to Udayammai Achi filing O. S. No. 10 of 1940 in the Court of the District Judge, West Tanjore, out of which Appeal No. 259 of 1942 arises. On the 10th November, 1936, Alagammai Achi attached the mortgage rights and again Umayal objected with success. This resulted in Alagammai Achi filing O. S. No. 11 of 1940, out of which Appeal No. 260 of 1942 arises. In both the suits it was alleged that the decree obtained by Umayal Achi in O. S. No. 1693 of 1931 was obtained as the result of fraud and collusion, but the Court held that this was not so, and in this Court the validity of the decree has not been questioned. It was also alleged that the assignment of Kasi Viswanathan's interest and that of Chellappa's interest were effected for the purpose of defrauding creditors. That contention was also negatived and this decision goes unchallenged. In this Court the only question which has been raised by the appellants is whether Kasi Viswanathan as the manager of the family was entitled in law to transfer Chellappa's interest in the mortgage without the sanction of the Court. It has been accepted that the transfer of his own one-third interest passed a valid title to his wife to that extent.

If Kasi Viswanathan had been the guardian *ad litem* of Chellappa, he could not have transferred Chellappa's interest in the mortgage without the consent of the Court. The decision of the Judicial Committee in *Ganesha Row* v. *Tuljaram Row*[1] places this beyond doubt. In delivering the judgment of the Board in that case, Mr. Ameer Ali said :

1. (1913) 25 M.L.J. 150 : L.R. 40 I.A. 132 : I.L.R. 36 Mad. 295 (P.C.).

"How far the acts of a father or managing member may affect a minor, who is a party to the suit represented by another person as next friend or guardian *ad litem* is a question which does not arise in the case, and their Lordships are not called upon to express an opinion on it. But they consider it to be clear that when he himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment."

Order 32, rule 7, Civil Procedure Code, expressly prohibits a next friend or guardian entering into an agreement or compromise on behalf of the minor with reference to the suit without the leave of the Court. Rule 15 applies the same provision to a person who acts as the guardian of one who is of unsound mind. But it does not follow from what their Lordships said in *Ganesha Row* v. *Tuljaram Row*[1] that where the guardian is some other person than the father or manager the position is the same. It is the bounden duty of a manager of a joint family to pay the debts of the family out of the family assets and for that purpose he can, of course, also dispose of the interests of coparceners who happen to be minors. Therefore unless rule 7 of Order 32, applies to a person in the position of Kasi Viswanathan, he had the right in law to transfer Chellappa's interest.

In *Ramalingam Chetti* v. *Radhakrishna Chettiar*[2], a Bench of this Court held rules 6 and 7 of Order 32 contain no restriction on the power of a father or a manager of a joint Hindu family to receive the amount of a decree and to give a discharge, which will bind a minor member of the family who is a party to the suit, where he is not the next friend or guardian of the minor. In such a case the leave of the Court is not required. This judgment was relied on by Varadachariar, J., in his judgment in *Marwadi Vannaji* v. *Ranga Rao*[3], where the facts were these. A joint family consisted of a father and three sons, the third son being a minor. The adult members executed a deed of conditional sale which was also signed by the father as the guardian of his minor son. The deed was executed to discharge a liability due to the plaintiff under a previous mortgage. The mortgagee had sued on the mortgage and the Court had held that it was not binding on the second and third sons in respect of their shares in the ancestral property, as it had not been given to secure an antecedent debt, but that it was supported by consideration. The second deed was executed after this decision had been given and in due course the mortgagee sued to recover possession of the property by virtue of the deed of conditional sale. The Court treated that document as constituting a mortgage by conditional sale and gave a decree for foreclosure. The minor was represented in the previous suit by a guardian appointed by the Court. In the appeal which was filed against the mortgage decree it was contended that the minor's share was not affected by the deed of conditional sale, but the Court held that the decision in the mortgage suit did not exonerate the minor. The debt due to the plaintiff was neither illegal nor immoral and he was bound by the second mortgage. Varadachariar, J., held that rule 7 only applies to a father who is also the guardian *ad litem* of his minor son and added that there was no justification for extending the provisions of the rule by analogy or considerations of policy. These two decisions are directly in point and run directly counter to the case set up by the appellant.

*Ramalingam Chetti* v. *Radhakrishna Chettiar*[2] was decided by a Bench and the decision is binding on us, unless there is a Bench decision which conflicts with it, in which case we shall have to decide the matter ourselves. Mr. Rajah Aiyar has suggested that *Ramalingam Chetty* v. *Radhakrishna Chettiar*[2] is in conflict with the decision of the Bench which decided *Vijaya Ramayya* v. *Venkatasubba Rao*[4]. An examination of the judgment in the latter case however discloses a situation very different from the situation here. There the suit was brought by minors to set aside a compromise decree passed in a partition suit in which they had been defendants, together with an undivided brother and their father. In the partition suit the father acted as their guardian *ad litem*. The questions in dispute were referred

1. (1913) 25 M.L.J. 150 : L.R. 40 I.A. 132 : I.L.R. 36 Mad. 295 (P.C.).
2. (1935) 70 M.L.J. 700.
3. (1937) 1 M.L.J. 384.
4. (1915) 30 M.L.J. 465 : I.L.R. 39 Mad. 853.

to arbitration without the leave of the Court and the award which was given was made a decree of the Court in spite of opposition. The brother, on behalf of himself and as the guardian of the minors, filed an appeal, in which the father also joined. While the appeal was pending, the father entered into a compromise without the sanction of the Court. The subsequent suit was filed to set aside the compromise decree. The suit was decreed and on appeal it was argued that as the compromise was entered into by the plaintiffs' father and not by their guardian *ad litem* no sanction of the Court was necessary. This contention was rejected on the short ground that the Court could not accept the suggestion that when the father had no responsibility for them and when their interests were entrusted to another person, he should have larger powers to bind them. There the father had acted as the guardian *ad litem* in the trial Court, but he let his adult son fulfil that function for the purposes of the appeal. The facts are so different that we think that *Vijaya Ramayya* v. *Venkatasubba Rao*[1] can be distinguished from *Ramalingam Chetti* v. *Radhakrishna Chettiar*[2]. In the former case the Court actually passed a decree in accordance with the compromise without having sanctioned it. We consider that the principle stated in *Ramalingam Chetti* v. *Radhakrishna Chettiar*[2] should be applied here.

In *Gurumallappa* v. *Mallappa Martandappa*[3], Macleod, C.J., said that though rule 7 of Order 32 applies to execution proceedings :

> " there seems to me to be a distinction between a case where the minor's liability has already been determined by a decree in his father's lifetime, and a case where the minor's liability in the first instance is in dispute. For, in the former case there is a debt which the guardian is clearly entitled to pay off in full, and the fact that the judgment-creditor has issued execution against the minor making an outsider his guardian *ad litem*, does not in my opinion alter the situation."

Heaton, J., dissented from this opinion. He thought that the rule necessarily implied that during the continuance of proceedings in Court, the dispute between the minor and another party which the Court had to decide could not be compromised except by the guardian *ad litem* of the minor, and by him only with the leave of the Court.

In our judgment, rule 7 merely applies to the guardian or next friend in the suit and when the father or manager of the family is not the guardian or next friend of the minor, his powers are unaffected. We agree with Varadachariar, J., that analogy or considerations of policy cannot be called in aid for the purpose of whittling down powers of the father or manager. Of course, if there is fraud or collusion, different considerations will apply ; but it is now admitted that there was no fraud or collusion in this case. Moreover, the guardian of the lunatic has raised no objection. The objection merely comes from creditors. Even if the guardian had objected, the position would not be different, but the fact that she has not objected makes the case for the contesting respondents all the stronger.

For the reasons indicated we hold that the transfer by Kasi Viswanathan of Chellappa's share was lawful. Consequently the appeals will be dismissed with the costs of the first respondent in Appeal No. 259 of 1942 and of the respondent in Appeal No. 260 of 1942.

B.V.V. ——— *Appeals dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUNHI RAMAN.

P. C. Krishnan Atiyoti .. *Appellant**

*v.*

The Province of Madras, represented by the Collector of South Kanara District and others .. *Respondents.*

*The Madras Revenue Recovery Act (II of 1864), section 36—Exact place of sale not mentioned in notification —Price realised at sales grossly inadequate—Sale not valid.*

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1. (1915) 30 M.L.J. 465 : I.L.R. 39 Mad. 853.
2. (1935) 70 M.L.J. 700.
3. (1919) I.L.R. 44 Bom. 574.

* S. A. No. 1301 of 1942. 17th December, 1943.

Where a piece of land was sold for realising arrears of land revenue and the sale proclamation did not specify the exact place of sale and the irregularity had resulted in substantial injury,

*Held*, that since the provision of law requiring that the place of sale must be specified in the notification under section 36 of the Revenue Recovery Act was mandatory and had not been obeyed the sale is not valid.

*Bommayya Naidu* v. *Chidambaram Chettiar*, (1899) 9 M.L.J. 190 : I.L.R. 22 Mad. 440, followed.

Appeal against the decree of the Court of the Subordinate Judge of South Kanara in A. S. No. 620 of 1939, preferred against the decree of the Court of the District Munsiff, Kasargod, in O.S. No. 753 of 1936.

*P. Govinda Menon* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*), *P. Anandan Nair*, *K. Srinivasa Rao* and *B. Pocker* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant in this second appeal. The suit was for a declaration that the sale under the Madras Revenue Recovery Act of a piece of land measuring 15 acres and 75 cents for Rs. 300 was not valid. The land belongs to the plaintiff's tarwad. The plaintiff is a junior member of the tarwad, but the Courts below have described him as the *de facto* manager of the properties of the tarwad and the suit has been found to be maintainable. This has not been questioned here. The property was sold because arrears of land revenue had accumulated to the extent of Rs. 20-14-0 and this amount was not paid by the karnavan who is the ninth defendant. The sale was on the 28th May, 1935. The assessment on the property sold is Rs. 78-12-0 and the land is situated in the village of Cheravathur in Kasargod Taluk of the South Kanara District. Several contentions were urged in the Courts below on behalf of the plaintiff in support of his case that the sale was invalid and must be set aside, but the main argument addressed here on behalf of the plaintiff is that there was a material irregularity inasmuch as the sale proclamation did not specify the place of sale and this material irregularity has resulted in substantial injury because land which is admittedly worth Rs. 2,000 has been sold for Rs. 300 for default of payment of Rs. 20-14-0 due as land revenue. The learned District Munsiff was satisfied that substantial injury was caused to the plaintiff-appellant as a result of the irregularity. But he was not prepared to hold that the irregularity complained of was sufficiently serious to warrant interference. In paragraph 31 of his judgment he states as follows :

> " It is improbable that the property now in question, which is 15 acres 75 cents, is worth only Rs. 300. If it was proved that there were irregularities or illegalities vitiating the same, I would have had no hesitation in holding that there was substantial injury as a result thereof."

The same view about the injury caused is taken by the learned Subordinate Judge who states in paragraph 5 of his judgment,

> " So far as the inadequacy of the price fetched at the sale is concerned, there can be little doubt that the finding of the learned District Munsiff is correct."

The sale proclamation merely stated that the sale would take place in Cheravathur village which, it is conceded, is about six square miles in extent. It did not mention the exact place where the sale would be held. It appears from the evidence that the sale was actually held in the vicinity of the property that was sold.

The appellant's complaint is that the Revenue authorities did not comply with the mandatory provisions of section 36 of the Revenue Recovery Act, Madras Act II of 1864 according to the second clause of which :

> " Previous to the sale the Collector, or other officer empowered by the Collector in that behalf, shall issue a notice thereof in English and in the language of the district, specifying the name of the defaulter; . . . . and the time, place and conditions of sale. This notice shall be fixed up one month at least before the sale in the Collector's office and in the Taluk Cutchery in the nearest police station house, and on some conspicuous part of the land."

In the present case it is admitted that the notification referred to in this section did not mention the exact place, in the six square miles of the village where the sale was going to be held. According to the section, it is obligatory to mention it. The contention of the respondents which found favour in the Courts below was that it would be sufficient compliance with the provisions of section 36 if the village in which the auction is to be held is mentioned in the notification. I am not satisfied

that this contention is correct especially in view of the nature of the village. In the present case the village is about six square miles in extent and as is characteristic of the districts of Malabar and South Kanara the residences of the inhabitants would be found scattered all over the village and not crowded together in any particular part of it in the shape of a street or streets. The learned Subordinate Judge states that according to the report of the officer who conducted the auction there were about 25 persons present at the sale and he therefore thinks that there was sufficient compliance with the section. This does not appeal to me as a valid or sufficient reason for holding that strict compliance with the provisions of the section is not necessary. As pointed out by the appellant's learned advocate, the bidders' list shows that only four persons actually took part in the bids. Therefore it is very doubtful whether the statement contained in Ex. XII that 25 persons were present is accurate. It is possible that a crowd had collected when the auction was taking place but the members of such a crowd cannot be regarded as persons who had attended the auction *bona fide* for the purpose of bidding or were attracted by the notice published under section 36. The learned Subordinate Judge states further that there is no proof for the plaintiff that as the result of the omission to give the exact place of sale in the village, any material injury was caused. As already stated, both the lower Courts have agreed that the price of Rs. 300 realised at the sale for the suit land measuring nearly 16 acres in extent is grossly inadequate and that there was substantial injury sustained by the plaintiff-appellant. In such circumstances, as pointed out in *Bommayya Naidu* v. *Chidambaram Chettiar*[1], direct evidence is not necessary to connect inadequacy of price realised with a material irregularity, where the latter has been proved and the relation of cause and effect between the two may be inferred where such inference is reasonable.

A mandatory provision of law which requires that the place of sale must be specified in the notification under section 36 has not been obeyed. This in the present case amounts in my opinion to serious irregularity and the irregularity has resulted in substantial injury to the owner of the property according to the view expressed in *Bommayya Naidu* v. *Chidambaram Chettiar*[1]. Therefore the conditions necessary for setting aside the sale have been fulfilled and the plaintiff is entitled to the relief asked for.

In the result, the second appeal must be allowed and the suit decreed with costs throughout payable by all the respondents except respondents 1, 9 and 10. The appellant shall proceed in the first instance against the ninth defendant for recovering costs.

Leave refused.

V.P.S. *Appeal allowed.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR.

Amuluru Venkamma .. *Appellant.**

*Court-Fees Act (VII of 1870), section 7 (x) (a), schedule I, Article I and schedule II, Article 17-B (Madras)—Suit for specific performance of contract of exchange of immovable property—Appeal—Court-fee payable.*

Where the question was as to the provision of the Court-Fees Act applicable to the case of an appeal in a suit for specific performance of a contract of exchange of immovable property,

*Held*, that neither section 7 (x) (*a*) nor article 17-B, schedule II (Madras) of the Court-Fees Act governs the question. The suit was not a suit for specific performance of a contract of sale, nor can it be said that the subject-matter of the suit was incapable of valuation. Hence it is article 1, schedule I, the residuary article, which has to be applied to determine the court-fee payable on appeal as the memorandum of appeal of the nature here under consideration has not otherwise been provided for in the Act.

Appeal sought to be preferred to the High Court against the decree of the District Court of Nellore in A. S. No. 80 of 1940, preferred against the decree of the Court of the Subordinate Judge of Nellore in O. S. No. 19 of 1937.

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1. (1899) 9 M.L.J. 190 : I.L.R. 22 Mad. 440.

* Stamp Register No. 21297 of 1943. 28th January, 1944.

This Stamp Register coming on for orders on 19th December, 1943, on the question of court-fee payable on the Memorandum of Appeal herein under section 5 of the Court-Fees Act, the Court (Master) made the following

ORDER : The question which arises for consideration in this matter is whether a suit for specific performance of a contract for exchange of immovable property is one which is incapable of valuation or one which falls under section 7 (x) of the Court-Fees Act. Section 7 (x) of the Act provides for suits for specific performance of contracts of several kinds, contract of sale, contract of mortgage, contract of lease and for an award. There is no provision made in that section for a contract of exchange of immovable property. Learned counsel for the appellant contends that the relief asked for must be taken to be incapable of valuation and that the proper court-fee is that payable under Article 17-B of Schedule II of the Act. As against this, the appeal examiner seeks to rely on a decision in *Kundan Lal* v. *Anund Sarup*[1] where it was held that a suit for specific performance of a contract of exchange of immovable property should be treated as being in the nature of a suit for specific performance of a contract of sale and that court-fee should be levied under section 7 (x) (*a*) of the Act.

It appears to me that a sale plainly involves the payment of money. In an exchange, there is no payment of money. Ordinarily, I should be content to follow a decision of a High Court but as the correctness of the view expressed in that decision has been questioned in two well-known commentaries on the Court-Fees Act and as the question that has come up for consideration appears to be one of general importance, I place this matter for decision by the Honourable the Taxing Judge.

*V. Govindarajachary* and *K. Kuppuswami* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) on behalf of the Government.

In pursuance of the aforesaid Order, the Court delivered the following

JUDGMENT.—Neither section 7 (x) (*a*) nor Article 17-B of Schedule II of the Court-Fees Act appears to govern the question. We are not here concerned with a suit for specific performance of a contract of sale, nor can it be said that the subject-matter of the suit is incapable of valuation. Article 1 of Schedule I which is the residuary article has to be applied here, as a memorandum of appeal of the nature here under consideration has not otherwise been provided for in the Act.

V.S. ——— *Answer accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

S. P. Bhoominathan Chettiar .. *Appellant**

*v.*

K. S. N. Chari & Co. by sole proprietor K. S. Narasimhachariar .. *Respondent.*

*Contract—Wagering contract—Deposit made as security—If and when can be recovered.*

While a wagering contract cannot be enforced, a deposit made by one gambler with the other as security can be recovered unless the amount has in fact been appropriated for the purpose for which it was deposited.

*Universal Stock Exchange* v. *David Strachan*, (1896) A.C. 166, relied on.

On appeal from the judgment and decree of the Hon'ble Mr. Justice Bell, dated 12th February, 1943, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 63 of 1942.

*T. V. Viswanatha Aiyar* for Appellant.

*K. Rajah Aiyar* for *T. V. Ramanatha Aiyar* and *L. V. Krishnaswami Aiyar* for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—The plaintiff is a Nattukottai Chetti carrying on a banking business at Devakottai. The defendant carries on business as a commission agent in Madras under the style of K. S. N. Chari and Company. On the 13th December, 1939, the plaintiff commenced dealing with the defendant in cotton futures and the dealings continued until the 10th June, 1940. During this time the plaintiff had entered into nine contracts with the defendant for the sale of Broach cotton for future delivery and ten contracts for the purchase from him of similar cotton. Cotton was never demanded or delivered. The plaintiff was in fact entirely ignorant of what was meant by Broach cotton. At the end of these transactions there was due by the defendant for differences a sum of Rs. 5,076-7-1. The plaintiff had

1. A.I.R. 1923 Lah. 456.

* O. S. A. No. 28 of 1943. 18th November, 1943.

deposited with the defendant as cover for the due payment of differences, should he lose on any transaction, a total sum of Rs. 3,000. On the 26th March, 1942, he filed this suit to recover from the defendant these two sums with interest. Notwithstanding that the defendant claims to be a broker, and according to his learned advocate he entered into many such transactions, he pleaded that the plaintiff's suit could not be maintained because the transactions represented wagering contracts. The learned trial Judge Mr. Justice Bell, accepted this plea, but held that the defendant was liable to repay Rs. 2,000 out of the Rs. 3,000 which the plaintiff had deposited with the defendant and for this amount he gave a decree with interest at four and a half per cent. The plaintiff has appealed and the defendant has filed a memorandum of cross-objections. The plaintiff says that even if the contracts are to be regarded as wagering transactions, he is entitled to a decree for Rs. 3,000 the full amount of his deposit. The defendant says that the learned Judge erred in holding that the defendant was responsible to make any repayment to the plaintiff. He also complains that the learned Judge passed an erroneous order with regard to costs. The plaintiff had failed, except as regards Rs. 2,000 but costs were allowed on the full amount claimed.

There can be no doubt that the learned Judge was right in holding that these transactions were of a wagering nature. In fact, nothing has been said in favour of the appeal on this point. Mr. T. V. Viswanatha Aiyar, for the appellant, has limited his arguments to his client's claim for the return of the Rs. 1,000, the balance of the deposit.

On the 13th December, 1939, the plaintiff deposited with the defendant Rs. 2,000 as cover for any sum which might become due to the defendant in respect of the transactions entered into or to be entered into. On the 14th February, 1940, the defendant required the plaintiff to increase his deposit by another Rs. 1,000 and this the plaintiff did. On the 8th March, 1940, there was money due by the plaintiff to the defendant, who appropriated Rs. 1,000 of the money deposited in settlement of the account. As the result of further transactions the defendant became indebted to the plaintiff. On the 29th March, 1940, there was due by the defendant to the plaintiff for differences a sum of Rs. 2,568-14-6. The defendant induced the plaintiff to agree to Rs. 1,000 of this sum being retained by the defendant in place of the Rs. 1,000 which had been deposited on the 14th February, 1940 and appropriated on the 8th March, 1940. The defendant paid the balance of Rs. 2,568-14-6 to the plaintiff by cheque. This arrangement meant a total deposit of Rs. 3,000 by the plaintiff with the defendant as cover for differences. The learned Judge disallowed Rs. 1,000, as in his opinion it represented a payment of differences. We find ourselves unable to concur in this opinion. The transaction represented a payment made by the defendant to the plaintiff and the deposit by the plaintiff of the amount as cover.

While a wagering contract cannot be enforced, a deposit made by one gambler with the other as security can be recovered, unless the amount has in fact been appropriated for the purpose for which it was deposited. Section 18 of the Gaming Act, 1845, said that:

"No suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing . . . . . which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

In *Strachan* v. *Universal Stock Exchange, Limited*[1], it was held that this section only applied to money or valuable things deposited as the stake to abide the event of a wager and did not apply to money or valuable things deposited as security for the observance by the loser of the terms of the wagering contract. It was further held that a person making the deposit might revoke the arrangement and recover his security at any time before the holder had appropriated it. This decision was approved of by the House of Lords in *Universal Stock Exchange, Limited* v. *David Strachan*[2]. In the course of his judgment Lord Herschell observed :

"It is said that although it may be gambling contract, yet nevertheless the very provisions of the section against gaming and wagering prevent the plaintiff recovering the security which he deposited

1. (1895) 2 Q.B. 329. 2. (1896) A.C. 166 at 173.

with the defendants inasmuch as it is an 'article of value' deposited with them to abide the event of a wager. That seems to me not to be the case. It was deposited as security against a debt which might arise from a gambling transaction. What the defendants are really seeking is to avail themselves of that security by virtue of a void contract, and it is impossible to say that that was an article 'of value' deposited with the defendants to abide the event of a wager. That was not really the nature of the transaction at all."

Here, as in that case, the deposit was made as security for the fulfilment of the plaintiff's obligation. At the time when this suit was filed the defendant held Rs. 3,000 of the plaintiff as such security, but there was nothing owing by the plaintiff to the defendant. On the other hand the defendant owed the plaintiff Rs. 5,076-7-1. In these circumstances, the plaintiff is entitled to the recovery of the full amount deposited by him. It follows that the amount awarded by the trial Court will be increased by Rs. 1,000 and the total amount will carry interest at four and a half per cent. from the date of the institution of the suit to this date. Hereafter the defendant will pay interest at the rate of six per cent. on the decretal amount until payment or realisation. The plaintiff is entitled to his costs below, and here on the sum of Rs. 3,000.

The memorandum of cross-objections will be dismissed without costs.

K.S. *Appeal allowed and memorandum of cross-objections dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

E. M. Muthappa Chettiar .. *Appellant**

*v.*

The Venus Assurance Co., Ltd., Delhi and others .. *Respondents.*

*Insurance—Fraudulent concealment by assured of material facts in proposal forms—Policies rendered void—No agreement for forfeiture of premiums—Refund of premiums—If can be claimed—Contract Act (IX of 1872), sections 64 and 65—Applicability.*

Where a policy of insurance has been rendered void on the ground of concealment of material facts in the proposed form, notwithstanding that there was no agreement for forfeiture of the premiums a refund of the premiums paid cannot be claimed. In order to permit an Insurance Company to forfeit premiums paid in such a case it is not necessary that there should be an agreement to that effect.

Where the declaration in the proposal signed by the assured contains an agreement by him that the company shall have the right to repudiate the policy and to forfeit all moneys paid by way of premiums in the event of any statement made by him proving to be untrue or misleading that is sufficient in law to justify the forfeiture of the premiums but when the policy itself declares that the proposal and declaration form the basis of the assurance, there is no room for argument to the contrary. Neither section 64 nor section 65 of the Contract Act is applicable.

Appeals against the decrees of the Court of the Subordinate Judge of Devakottai in O. S. Nos. 7 to 12 of 1940, respectively.

*T. V. Muthukrishna Aiyar* and *R. Sundaralingam* for Appellant in App. Nos. 191 to 196 of 1942 and for Respondent in App. No. 197 of 1942.

*Pais, Lobo* and *Alvares* for Respondent in App. No. 191 of 1942 ; *V. K. Thiruvenkatachari* for Respondent in App. No. 192 of 1942 and for Appellant in App. No. 197 of 1942.

*K. Bhashyam* and *T. R. Srinivasan* for Respondent in App. Nos. 193 to 196 of 1942.

The Judgment of the Court was delivered by

*The Chief Justice.*—The father of the plaintiff in the suits out of which these appeals arise insured his life under the following policies :

| Date. | Company. | Amount. |
|---|---|---|
| 5—11—1934 | Tropical Insurance Co., Ltd. .. | Rs. 9,000 |
| 10—5—1935 | Metropolitan Insurance Co., Ltd. .. | „ 10,000 |
| 13—6—1935 | Lakshmi Insurance Co., Ltd. .. | „ 10,000 |
| 25—10—1935 | Hindustan Co-operative Insurance Society, Ltd. .. | „ 10,000 |

*Appeal Nos. 191 to 197 of 1942. 1st December, 1943.

| Date. | Company. | Amount. |
|---|---|---|
| 21—11—1935 | Lakshmi Insurance Co., Ltd. | .. Rs. 10,000 |
| 9—3—1936 | Venus Assurance Co., Ltd. | .. „ 10,000 |
| 19—5—1936 | New India Life Assurance Co., Ltd. | .. „ 10,000 |
| 11—8—1936 | Metropolitan Insurance Co., Ltd. | .. „ 5,000 |

The assured died on the 18th January, 1937. All the Insurance Companies repudiated their liability on the ground that there had been material misrepresentation on the part of the assured and the plaintiff challenged their action in suits filed by him in the Court of the Subordinate Judge of Devakottai. The defence in each case was that in the proposal form the assured had falsely stated that he had never before made a proposal for life insurance, that he had understated his age by six years and that he had falsely declared that he had not suffered from any of the diseases specified in the personal statement which he was required to sign before the Medical Officer at the time of his medical examination. The Subordinate Judge held that these allegations were true and that consequently the companies were entitled to repudiate their liability. In the alternative the plaintiff pleaded that he was entitled to a return of the insurance premiums which his father had paid. This plea was rejected except in respect of the Tropical Insurance Co., Ltd. In that case, the Subordinate Judge held that the plaintiff was entitled to recover the premiums because the policy did not embody a condition that the company was to be entitled to retain the premiums paid in the event of the policy becoming void as the result of material misrepresentation on the part of the assured. Appeal Nos. 191 to 196 of 1942 have been filed by the plaintiff and Appeal No. 197 of 1942 by the Tropical Insurance Co., Ltd., which contends that the plaintiff was not in law entitled to a refund of the premiums.

In 1926, the assured made a proposal to the United India Life Assurance Co., Ltd., for the issue to him of a policy for Rs. 10,000 and in 1930 he made a proposal to the Sun Life Assurance Company of Canada for the issue of a policy for Rs. 20,000. Neither of these proposals was accepted as the proposer failed to pass the medical test. The declaration made by the assured that he had never made a proposal before 1934 was false. The plaintiff averred that his father was not the person who made the proposal in 1926 to the United India Life Assurance Co., Ltd., or in 1930 to the Sun Life Assurance Company of Canada, but his evidence was disbelieved and the Court held that in both the cases the proposer was his father. Mr. Muthukrishna Ayyar has rightly stated that he cannot dispute the identity of the proposer and consequently the finding of the Subordinate Judge that the declaration of the plaintiff's father was false will stand. This is in itself sufficient to render the policies void and it is not necessary for this Court to consider the question of the age of the proposer or the answers given by him in the course of his medical examination.

Mr. Muthukrishna Ayyar has, however, pressed the contention that the Subordinate Judge erred in not directing the refund of the premiums, except in one instance. He conceded that if the policy included a forfeiture clause the plaintiff would not be entitled to a refund of the premium, but he said that the condition must appear in the policy itself. In only one policy was there such a clause, that issued by the Lakshmi Insurance Co., Ltd., for Rs. 10,000, on the 21st November, 1935. Except in the case of that company and the Tropical Insurance Co., Ltd., the assured signed a declaration in the following terms :

" I, the undersigned, do hereby solemnly declare that the above-written answers and those in reply to the questions put by the company's Medical Examiner with reference to this proposal and also the statements that I have made in connection with this proposal, are true to the best of my knowledge and belief and that I have not withheld or concealed any circumstance with regard to which information has been required from me and I do hereby agree that this proposal and declaration shall form the basis of the contract for the proposed assurance and that in case any of my answers or statements as aforesaid is found to be untrue or misleading the contract and with it the policy that may be issued in pursuance thereof shall be null and void and all moneys which shall have been paid on account of the assurance shall be forfeited to this company. I do also agree that in the event of this my proposal for assurance being accepted and my failing to complete the

contract, I shall be liable to pay the sum of Rs. 16 (Rupees sixteen only) as compensation to the company and that the said amount may be realised by the company out of my money, if any, deposited with the company and/or by legal action."

This is the declaration required by the Metropolitan Insurance Company, Ltd. There are minor differences in wording in the declarations, required by the Hindustan Co-operative Insurance Society, Ltd., the Venus Assurance Co., Ltd., and the New Indian Life Assurance Co., Ltd., but it is common ground that they were all to the same effect.

The policy of the Metropolitan Insurance Co., Ltd., commences with this recital :

"Whereas the Metropolitan Insurance Co., Ltd., hereinafter called 'the company' has received a proposal and declaration for Assurance, which proposal and declaration with the statements contained and referred to therein the proposer named in the schedule printed on the second page hereof has agreed shall be the basis of the assurance, and whereas the company has received the first premium for an Assurance of the amount and on the terms stated in the said schedule."

The policy then proceeds :

"Now this the policy witnesseth that in consideration of the premises and on condition that there shall be duly paid to the company the subsequent premiums as stipulated for in the said schedule the company shall, upon proof to the satisfaction of its directors that the sum assured has become payable in terms of the said schedule, be liable to pay the amount thereof at its Head Office in Calcutta . . . ."

Again it is common ground that the other policies, except those issued by the Lakshmi Insurance Co., Ltd., and the Tropical Insurance Co., Ltd., are substantially the same.

It will be observed that the declaration signed by the assured contains an agreement by him that the company shall have the right to repudiate the policy and to forfeit all moneys paid by way of premiums in the event of any statement made by him proving to be untrue or misleading. This is sufficient in law to justify the forfeiture of the premiums, but when the policy itself declares that the proposal and the declaration form the basis of the assurance there is no room for argument to the contrary. In *The Oriental Government Security Life Assurance, Co., Ltd.* v. *Narasimhachari*[1], this Court held that neither section 64 nor section 65 of the Contract Act applied to a case in which the policy of life insurance becomes void by reason of a breach of warranty on the part of the assured. Therefore the plaintiff cannot call these sections in aid and in all cases but one he is faced with his own agreement that the company should have the right of forfeiture in such circumstances. This is not all against him as we shall presently indicate.

Mr. Muthukrishna Aiyar has suggested that the decision of this Court in *Krishna Chettiar* v. *Velayee Ammal*[2] has bearing and aids him in his contention that the policy itself must embody the agreement, but an examination of the judgment shows that this is not the case. The Court there had to consider the effect of section 6 of the Married Women's Property Act. That section states that a policy of insurance effected by a married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, as the case may be. The question was whether the statements in the proposal form were to be regarded as part of the policy and the Court held that this should be so regarded because this was expressly provided for in the policy. That decision is confined to the interpretation of the section and nothing said in the judgment has application here.

In order to permit an Insurance Company to forfeit premiums paid in such a case as this it is not necessary that there should be an agreement to this effect. In England the right of a company to forfeit without an agreement has always been recognised in law, although equity required a company seeking the cancellation of the policy, to return the premiums paid as a condition for the grant of relief. Our attention has been drawn to the following passage in "Macgillivray on Insurance Law," second edition, page 692 :

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1. (1901) 11 M.L.J. 379 : I.L.R. 25 Mad. 183. 2. (1938) 2 M.L.J. 22 : I.L.R. (1938) Mad. 909.

"Probably the principle upon which premiums are returnable in the case of fraud is equally applicable to all classes of insurance, and is as follows : If an action is brought at law to recover the insurance moneys, the insurers may defend on the ground of fraud, and are not bound to tender a return of premiums. The assured cannot bring a separate action or counter-claim for a return of premiums because in order to do so he would have to allege his own fraud. If, however, an insurer seeks relief which is purely equitable, and which could in former days have been obtained only in a Court of Equity he must offer to return the premiums in respect of which he has never been on the risk. The insurer cannot, therefore, even on the ground of fraud, bring an action for rescission and delivery up of the policy without offering to return the premiums received. And possibly the Court would require a return of premiums in such cases even although there is an express provision in the policy that the premiums shall be forfeited to the company."

In view of the decision of the Court of Appeal in 1880 in *Rivaz* v. *Geruss*[1], this statement of the law so far as it concerns the Court of Chancery may be open to question. That was an action for the cancellation of a policy of insurance on the ground of concealment of material facts and it was expressly held that the defendant was not entitled to the return of his premiums. The statement is undoubtedly correct so far as the present actions are concerned.

It is a well-established principle that Courts will not entertain an action for money had and received where, in order to succeed, the plaintiff has to prove his own fraud, and the plaintiff's claim for the return of the premiums, must be taken to be a claim for money had and received. This principle was discussed by the Court of Appeal in the recent case of *Berg* v. *Sadler and Moore*[2]. The Master of the Rolls (Lord Wright) there said :

"To maintain an action for money had and received he "—the plaintiff in that case—" has to prove the exact circumstances in which the money was paid, and the circumstances which he says entitle him on grounds of justice to have an order for repayment. If, however, he proceeds to that proof he can only establish his claim by proving facts which show that he was engaged in a criminal attempt to obtain goods by false pretences. The Court on well-established principles will refuse to give its aid to any claim which can only be established by proving facts of that nature."

Romer, L.J., said :

"The money was paid by the plaintiff to the defendants in the course and for the purposes of an attempt on the part of the plaintiff to defraud the defendants. The fact that, owing to the vigilance of the defendants, the attempt was frustrated is, in my opinion, wholly immaterial."

Scott, L.J., said :

"He says he claims for money had and received upon the total failure of consideration of his contract. The contract was, however, fraudulently induced. In my opinion, he is inevitably invoking the assistance of the Court to enforce that illegal contract when he frames his claim in that way and the maxim applies. Any other judgment would be contrary to the basic principles of justice."

In the present cases the assured induced the insurance companies to issue policies as the result of fraudulent concealment of material facts. In order to obtain the return of the premiums the plaintiff has to call in aid his father's fraud, and this the Court cannot allow. It follows that the Subordinate Judge erred in holding that the plaintiff was entitled to recover the premiums from the Tropical Insurance Company, Ltd., notwithstanding that there was no agreement between the assured and the company for forfeiture.

For the reasons given the appeals filed by the plaintiff will be dismissed with costs and the appeal filed by the Tropical Insurance Company, Ltd., will be allowed with costs here and below.

K.S. *Appeal No. 197 of 1942 allowed and the other appeals dismissed.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA AND MR. JUSTICE HAPPELL.

Kailasa Tevar .. *Petitioner**

*v.*

Kasiviswanathan Chettiar (deceased) and others .. *Respondents.*

*Civil Procedure Code (V of 1908), section 110—One of the debtors remaining* ex parte *in suit as well as in appeal—Decree against all in the High Court—Passing of the Madras Agriculturists' Relief Act in the meanwhile*

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1. (1880) 6 Q.B.D. 222.
2. (1937) 2 K.B. 158.

* P. C. C. M. P. Nos. 3481 to 3488 of 1942. 17th December, 1943.

*—Applications by other defendants for scaling down—Finding by trial Court that all the defendants were agriculturists entitled to benefits of the Act—High Court's refusal to allow scaling down in regard to first defendant—Application by him to set aside* ex parte *decree to enable him to file application under Act IV of 1938—Application dismissed—Leave to appeal to the Privy Council—No leave as High Court's decision against first defendant is one of affirmance.*

Suits were brought by certain creditors for recovery of the sums due on either mortgage deeds or promissory notes executed by the first defendant, defendants 2 to 7 being the other members of his family. The first defendant remained *ex parte*. The trial Court exonerated some of the defendants and passed a decree against the rest in all the suits. Both parties filed appeals to the High Court and by a common judgment it was held that the creditors were entitled to a decree against all the defendants. Before the appeals were heard the Madras Agriculturists' Relief Act had been passed and applications were filed by defendants 2 to 7 for scaling down the debt. The petitions were sent down to the lower Court for findings on the questions whether the defendants were agriculturists and whether they were precluded from claiming the benefits of the Act by reason of their paying house-tax in respect of buildings of the annual rental value of Rs. 600 and upwards. The first defendant had been made a respondent in those petitions. The District Judge gave findings in favour of the defendants on both the points. The correctness of the findings was disputed in the High Court and it was contended that in any case the first defendant should not have the benefit of scaling down as he had not filed any application. The High Court ultimately allowed scaling down only as regards defendants 2 to 7. After the High Court decree, the first defendant moved the Court to have the *ex parte* decree against him set aside so that he might file applications for scaling down. The applications were rejected. On a petition for leave to appeal to the Privy Council against the decision that as he had not filed any petition he was not entitled to the benefits of the Act,

*Held*, that leave could not be granted as the decision of the High Court was one of affirmance of the lower Court's judgment, in regard to the first defendant who had not preferred any appeal from it.

*Held, further*, that there is no difference between a decision in cases where some issues alone were decided by the trial Court and findings on other issues are called for but not accepted by the High Court and the result is the dismissal of the appeal, and the case where a fresh right is given by the legislature and on the question whether the debtor is entitled to the benefits of the Act, the two Courts differ and the appeal is dismissed.

*Tassaduq Rasul Khan* v. *Kashiram*, (1902) L.R. 30 I.A. 35 : I.L.R. 25 All. 109 (P.C.), followed.

*Held also*, that the question whether the debtor is an agriculturist or not is a question of fact and it cannot be said that the decision of the High Court involved a substantial question of law.

Applications under sections 109 and 110 and Order 45, rules 2, 3 and 8, Civil Procedure Code respectively, praying for the grant of leave to the petitioner herein to appeal to His Majesty in Council against the judgment and decree of the High Court dated 25th March, 1942, in Appeal Nos. 48 of 1938, 313 to 319 of 1939, preferred against the decrees of the District Court of East Tanjore at Negapatam, dated 15th May, 1937, in O. S. No. 30 of 1934, etc.

*K. V. Ramachandra Aiyar* and *S. Thyagaraja Aiyar* for Petitioner.

*R. Kesava Aiyangar* and *T. K. Sundararaman* in C. M. P. No. 3481 of 1942; *S. Rangaswami Aiyangar* in C. M. P. No. 3482 of 1942 ; *R. Sundaralingam* in C. M. Ps. Nos. 3483, 3486 and 3487 of 1942 ; *K. S. Desikan* and *R. Vaidyanathan* in C. M. P. No. 3484 of 1942 and *S. Ramachandra Aiyar* in C. M. Ps. Nos. 3485 and 3488 of 1942 for Respondents.

The Order of the Court was made by

*Somayya, J.*—These are applications for leave to appeal to His Majesty in Council. The first defendant in the suit and the first respondent in the appeal is the petitioner. The suits out of which this and the connected petitions arise were filed by certain creditors for recovery of sums due on either mortgage deeds or promissory notes executed by the petitioner. The petitioner was the first defendant in the trial Court and the other members of his family were impleaded as defendants 2 to 7. The second defendant is his brother and defendants 3 to 7 are his paternal uncle's sons.

In 1895, there was a division between the two branches and it is in evidence that there was also a division between the petitioner and his brother as a result of O. S. No. 36 of 1935. The family business was kept joint and the petitioner was managing the business. The petitioner was *ex parte* in all the suits. The other defendants contended that they were not liable for the debts incurred by the first defendant. The trial Court exonerated some of the defendants and gave a decree against the others in all the eight suits. Both the parties filed appeals

to the High Court and there were eleven appeals in all. All the appeals were heard together and disposed of by a common judgment. This Court held that all the members of the two branches were liable in all the suits. In all the eight suits therefore the creditors succeeded in getting a decree against all the defendants.

By the time the appeals came on for hearing the Madras Agriculturists' Relief Act (IV of 1938) had been passed by the local Legislature. By virtue of the provisions of that Act, certain benefits were conferred upon agriculturists to have their debts scaled down in accordance with the provisions of that Act. Applications were filed by defendants 2 to 7 for scaling down the debt. Even those defendants against whom the suits had been dismissed by the lower Court filed such applications to provide for the contingency of the High Court passing a decree against them. According to a Full Bench decision of this Court such applications must be disposed of by the High Court after calling for such findings as may be necessary from the lower Court. There was a dispute whether the defendants were agriculturists and entitled to the benefits conferred under the Act and also on the question whether the defendants were precluded from obtaining any relief by reason of certain exceptions one of which is that a person who paid house-tax in respect of buildings of the annual rental value of Rs. 600 and upwards is not entitled to the benefits under the Act even though he was an agriculturist. The petitions filed by defendants 2 to 7 were sent down to the trial Court for finding on these questions. It may be mentioned that the first defendant (the petitioner herein) was made a respondent in these petitions. When the matter went back before the lower Court, the first defendant appeared by a pleader. The District Judge held that the defendants were agriculturists and that it was not proved that they paid house-tax on houses of the annual rental value of Rs. 600 or upwards. The District Judge was, therefore, of opinion that the petitioners were entitled to the benefits under the Act. As regards the amounts which would be due to each of the creditors in case the scaling down was permitted, both parties filed memoranda of consent showing what the amount would be if the debts were scaled down. In these memoranda, the first defendant's pleader also signed. When the matter came back to this Court after receipt of findings from the lower Court, the creditors disputed the correctness of the findings of the lower Court and also raised the further contention that in any case the first defendant ought not to be given the benefit of the Act as he had not filed any application to have the debt scaled down. This Court rejected the contentions of the creditors on the merits and held that as regards defendants 2 to 7 the debts should be scaled down and the figures given in the memoranda of consent filed by the parties were adopted. But as regards the first defendant—the petitioner herein—this Court held that as he had not filed any application, the decree against him should stand undisturbed.

After this Court passed the decrees, the petitioner moved this Court to have the *ex parte* decree against him set aside so that he might file applications under the Act and claim the benefits conferred thereby. We dismissed these applications holding that the applicant did not show sufficient reason for not appearing at the hearing of the appeals. This petition and the connected petitions are filed by the petitioner seeking leave to appeal to His Majesty in Council against the judgment passed by this Court holding that as he had not filed any application of his own, he is not entitled to the benefits of the Act.

The respondents concede that this is a case to which the provisions of Order 45, rule 4, Civil Procedure Code, would apply. The questions are substantially the same in all the suits both in the lower Court and here; and they were all disposed of by a common judgment. The petitioner is therefore entitled to consolidate all the appeals for purpose of valuation. In some of these suits the subject-matter of the claim is over Rs. 10,000 and it is conceded that even the difference between the amount of the decree and the amount due if the debt is scaled down is over Rs. 10,000. So, if all the suits are consolidated, there is no question that the total amount will be more than Rs. 10,000.

The only question is whether the decree of this Court is one of affirmance of the decision of the Court below and whether in case it is held that the decree is one of affirmance, the appeal to His Majesty in Council involves a substantial question of law. The Court below passed a decree against the first defendant as he was the executant of the document. This Court affirmed the decree ; in fact there was no appeal by the first defendant at all. It is difficult to see how it can be said that the decree of this Court is not one of affirmance of the decisions of the Court below. It is argued by the petitioner that the applications filed by the other defendants under the Madras Agriculturists' Relief Act were sent down to the lower Court, that that Court returned a finding in favour of the applicants and also in favour of the petitioner, the first defendant, that when this Court refused to accept that finding as regards the petitioner on the ground that he had not filed an application of his own, this Court was not affirming the decision of the trial Court on that question and that therefore the decree of this Court is not one of affirmance of the decision of the Court below. There is no substance in this contention. The decree of this Court referred to in section 110, Civil Procedure Code so far as the first defendant is concerned is one of affirmance. As we have pointed out, there was in fact no appeal by the first defendant. In *Tassaduq Rasul Khan* v. *Kashiram*[1], the Judicial Committee held that even though the judgment of the High Court is not based upon the same grounds on which the first Court's judgment was based, if the decree passed by the High Court is one of dismissal, it would be a case of affirmance of the decision of the lower Court. Where some issues alone were decided by the trial Court they being sufficient for the decision of that Court and the High Court calls for findings on other issues and the finding is not accepted by the High Court and the result is one of dismissal of the appeal, the same result should, we think, follow. If the grounds of the decision of the High Court may be different from those of the decision of the trial Court as held in the decision just cited, we fail to see how it could be said that in the latter case the result would be different. The case before us is no doubt one in which a fresh right as conferred upon certain classes of persons by Madras Act IV of 1938. The decision of the trial Court was in 1937. We fail to see any difference between a decision in cases where no finding was given by the trial Court on certain issues and findings are called for but not accepted by the High Court and the decision of the trial Court is in consequence affirmed by this Court, and the case where a fresh right is given by the Legislature and on the question whether the petitioner is entitled to the benefits of the Act the two Courts differ and the appeal is dismissed. We are therefore of opinion that the decree of this Court is one of affirmance of the decision of the lower Court.

The next question is whether the appeal involves a substantial question of law. The only question of law that the petitioner seeks to raise is whether he is an agriculturist and not excepted by the exceptions referred to above. In the counter-affidavit filed by the respondents they point out that the petitioner had become divided from his brother, (the second defendant) as a result of O. S. No. 36 of 1935, Subordinate Judge's Court, Tiruvarur, and that the first defendant was during the relevant period in possession of house property of an annual rental value of more than Rs. 600 and was assessed to house-tax. They say that even if the second defendant his brother had been found to be entitled to the benefits of the Act, it does not follow that the petitioner, the first defendant should also be entitled to the same benefits. The determination of this question involves an investigation of facts. There is no question of law involved. If the petitioner had during the two years preceding October, 1937, house property of the annual rental value of more than Rs. 600 and was assessed to house-tax in respect of such buildings, then it is conceded by the petitioner that he is not entitled to the benefit under the Act and it is equally conceded on the other side that if otherwise the petitioner is entitled to the benefits of the Act. This the right of the petitioner does not involve any question of law, but involves only a pure question of fact. Thus, there is no room for the argument that the appeal involves a substantial question of law.

1 (1902) L.R. 30 I.A. 35 : I.L.R. 25 All. 109 (P.C.).

These petitions are, in our opinion, unsustainable. It is said that an appeal has been filed by a creditor against the decision of this Court and that it has been admitted. But that, in our opinion, does not confer on the petitioner a right which he does not otherwise possess.

The petitions are dismissed with costs.

V.P.S. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Medam Gurumurthi Setty .. *Applicant**

*v.*

The Commissioner of Income-tax, Madras .. *Respondent.*

*Income-tax Act (XI of 1922 as amended by Income-tax (Amendment) Act VII of 1939), section 25-A—Partition—Meaning—Agreement to separate followed by division of some only of the items of family property—Deed of partition executed and registered two years later—Date of partition.*

A joint Hindu family consisting of brothers agreed to separate on the 15th of December, 1938, and divided the cash which they possessed as also the immovable properties, but the assets of a family business were not divided till 24th February, 1939. A deed of partition was also executed and registered on 22nd January, 1941.

On a reference whether the partition could be said to have taken place within the meaning of section 25-A of the Income-tax Act on the 15th of December, 1938,

*Held*, that there is a distinction to be drawn between separation of status and partition of family property. Section 25-A refers only to a partition. Partition means a completed partition. The fact that some assets are divided and others are left for division at a future date would not be a partition within the meaning of the section: In the circumstances of the case the date of partition is not the 15th of December, 1938.

Case referred to the High Court by the Income-tax Appellate Tribunal, Calcutta Bench, under section 66 (1) of the Indian Income-tax Act (XI of 1922), as amended, by section 92 of the Income-tax (Amendment) Act (VII of 1939), in Application No. 66 R. A. No. 14—Madras of 1942-43 on its file.

*P. Chandra Reddi* for Applicant.

*K. V. Sesha Aiyangar* for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—The assessee was the managing member of a joint Hindu family consisting of himself and his four brothers. On the 15th October, 1938, the brothers agreed to separate and on the 22nd January, 1941, a deed of partition was executed and registered. The family estate consisted of immovable and movable properties. On the 15th October, they divided the cash which they possessed and to each member was allotted a house. The other immovable property was also divided among the members on that date. On the 25th December, 1938, they divided the furniture and household utensils. The family had carried on a grocery business. The assets of this business were not divided until 24th February, 1939. The assessee contended before the Income-tax authorities, and the Income-tax Appellate Tribunal, Calcutta Bench, that for the purposes of section 25-A of the Income-tax Act, the partition must be deemed to have taken place on the 15th October, 1938. On the other hand, the Income-tax authorities maintained that the partition must be deemed to have taken place on the date when the deed was registered. The Appellate Tribunal concurred in this opinion. At the request of the assessee the Tribunal has referred to this Court the following question of law :

"Whether the partition could be said to have taken place within the meaning of section 25-A on 15th October, 1938, when the members began to live separately though all the properties were not divided."

There is a distinction to be drawn between separation of status and partition of family property. As pointed out by the Privy Council in Sundar Singh Majithia v.

* Case Referred No. 24 of 1943. 28th January, 1944.

*Commissioner of Income-tax*[1], section 25-A refers only to a partition of the property. If the Income-tax Officer is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions, he must record an order to that effect. On this being done, the members are assessed in accordance with the provisions of the section.

Partition means a completed partition. The fact that some assets are divided and others are left for division at a future date would not be a partition within the meaning of the section. In this case important assets, namely, those of the business were not divided until February, 1939, and the Court has been informed that other assets still remain to be divided. In these circumstances it is clear that the date of the partition is not the 15th October, 1938, and that is the answer we give to the reference.

The Commissioner of Income-tax is entitled to his costs, Rs. 250.

V.S. — *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT AND MR. JUSTICE HORWILL.

Korlam Sitaramaswamy Patnaik (minor) by mother and guardian Korlam Suramma .. *Appellant**

*v.*

Korlam Venkatarama Rao Patnaik (minor) by maternal grandfather and next friend Behara Adinarayana Patnaik .. *Respondent.*

*Provident Funds Act (XIX of 1925), section 5—Amount in deposit—Nomination of person to get the money—Nominee's death before depositor—No further nomination varying it—Amount vests in nominee and passes to her heirs.*

Where a person employed in a railway company had a deposit standing to his credit in the provident fund and he nominated his first wife as the person to receive the amount after his death but the nominee predeceased him and he subsequently did not vary the nomination at all,

*Held,* that the amount in deposit vested in the nominee absolutely whether she was a dependant or not; and the amount naturally will be inherited by her own son in exclusion of the other son of her husband by his second wife.

*Mon Singh* v. *Mothibai,* (1935) 71 M.L.J. 790 : I.L.R. 59 Mad. 855 and *Lakshmamma* v. *Subramaniam,* (1939) 1 M.L.J. 620, applied.

Appeal against the order of the Court of the Subordinate Judge of Chicacole, dated 19th October, 1942, in O. P. No. 2 of 1942.

*B. V. Subramaniam* for Appellant.

*P. V. Rajamannar* and *K. Subba Rao* for Respondent.

The Judgment of the Court was delivered by

*Horwill, J.*—The appellant and the respondent are step-brothers, being the sons of one K. Adinarayana Patnaik, who had been subscribing to a provident fund according to the rules of the Bengal Nagpur Railway Co., and who, at the time of his death, had a sum of Rs. 7,200 odd standing to his credit. He had nominated his first wife under the rules as the person to whom the sum standing to his credit in the provident fund should be paid on his death. She died as early as August, 1929; but he made no change in the nomination. Upon his death in 1941, he left a second wife, whom he married after the death of his first wife, and two sons, one by the first wife and the other by the second wife. The latter is the appellant and the former the respondent. The learned advocate for the appellant contends that as the nominee had predeceased her husband, the sum due to Adinarayana Patnaik was a sum belonging to him and undisposed of by will, and therefore belonged equally to his two sons. The respondent, on the other hand, contends that the sum vested in his mother, the nominee, and that therefore he

1. (1942) 2 M.L.J. 761 : 10 I.T.R. 457 (P.C.).

* A. A. O. No. 146 of 1943. 16th December, 194-

was entitled to the same exclusively. That view was upheld by the Subordinate Judge of Chicacole, and it is against that decision that the appellant has appealed.

The learned Subordinate Judge came to the conclusion he did on the wording of section 5 of Act XIX of 1925, which states :

"Subject to the provisions of this Act . . . . . any nomination, duly made in accordance with the rules of the fund, which purports to confer upon any person, the right to receive the whole or any part of such sum on the death of the subscriber or depositor, shall be deemed to confer such right absolutely, until such nomination is varied by another nomination made in like manner or is expressly cancelled by the subscriber or depositor by notice given in such manner and to such authority as is prescribed by those rules."

If a nomination is to be deemed to confer a right absolutely to receive money standing in the provident fund until another nomination is made, it means that the right vests in the nominee. This was pointed out by Beasley, C.J. and Stodart, J., in *Mon Singh* v. *Mothibai*[1]. The learned advocate for the appellant seeks, however, to distinguish that case, because it relates to a nominee who was not a dependent; and he contends that section 5 (1) applies only to nominees who are not dependants. Section 5 does not purport to have that limited application; but it is argued that unless section 5 is given this restricted application, it is not in consonance with sections 3 and 4. We do not, however find that section 5 cannot be reconciled with section 3 or section 4 without restricting the application of section 5. Section 3 purports to protect compulsory deposits against claims by creditors or assignees, and section 4 contains provisions regarding the payments out by the officer whose duty it is to make such payments. Neither section 3 nor section 4 purports to lay down the legal effect of a nomination; that is the purpose of section 5. The most that can be said for the appellant is that if there had been no section 5, a view different from that come to by the lower Court would be possible upon a reading of sections 3 and 4. That does not mean that sections 3 and 4 cannot be reconciled with section 5 unless this section is restricted in its application. The learned counsel for the appellant relies on the decision of Beasley, J., in *Cuffley* v. *M. & S. M. Ry. Co., Ltd.*[2], who adopted a line of reasoning not unlike that put forward here on behalf of the appellant. Beasley, J.'s decision was however largely influenced by the Provident Fund Rules framed by the Railway Company, which have since been considerably altered, as was pointed out by a Bench of this Court in *Lakshmamma* v. *Subramaniam*[3]. This last-mentioned decision distinctly laid down the rule that if a person has been nominated, the sum lying to the credit of the depositor at his death is payable to the nominee, whether he is a dependant or not. The learned advocate for the appellant says that there are decisions of other High Courts to the contrary; but as we find ourselves in respectful agreement with *Mon Singh* v. *Mothibai*[1] and *Lakshmamma* v. *Subramaniam*[3], we do not think it necessary to consider those other views.

If the provident fund of K. Adinarayana Patnaik vested in his first wife, it follows that after her death, her son inherited her right to the deposit.

The appeal is dismissed with costs.

K.C. *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

M. P. Nayagam .. *Appellant**

*v.*

A. R. Krishnaswami .. *Respondent.*

*Indian Companies Act (VII of 1913)—Rules framed under—Taxation rules of High Court—Order 5, rules 19 and 20, Original Side Rules—Application of.*

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1. (1935) 71 M.L.J. 790: I.L.R. 59 Mad. 855.
2. (1928) M.W.N. 402.
3. (1939) 1 M.L.J. 620.

* O. S. A. No. 65 of 1943. 21st January, 1944.

Rule 5 of the rules framed under the Indian Companies Act states that the High Court Fees Rules, 1933, as amended from time to time, shall apply to all proceedings under the Act and the rules framed under it, provided that, if the judge so directs the costs of an original petition shall be taxed by the taxing officer and the provisions of Order 5, rule 19 of the High Court Fees Rules shall apply to the taxation, or the judge may himself fix the amount of costs. The taxation rules of the High Court therefore apply to proceedings under the Companies Act or the rules framed under it.

On appeal from the order of Bell, J., dated 29th October, 1943 and made in the exercise of the ordinary original civil jurisdiction of the High Court in Application No. 2154 of 1943 in O. P. No. 22 of 1941.

*V. M. A. Muthu* for Appellant.

*K. S. Varadachari* for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—The appellant engaged the respondent, who is an advocate of this Court, to appear for him in an application for the winding up of a company registered under the Indian Companies Act. An order for winding up was passed and the Official Receiver who functions as the Official Liquidator was, as required by law, called upon to settle a list of creditors. The appellant is a creditor of the company and in the proceedings before the Official Liquidator the respondent appeared on behalf of the appellant. A dispute arose with regard to the fees which the respondent claimed for this work. Thereupon he applied to the Master for his bill of costs to be taxed under Order 5, rule 20 of the Original Side Rules. The learned Master held that that rule did not apply, because in his opinion the proceedings before the Official Liquidator were not proceedings in which a party or an advocate could apply for taxation. Accordingly he dismissed the application. On appeal, the order of the Master was reversed by Bell, J., and he was directed to proceed with the taxation. The appeal is from the order of the learned Judge.

We consider that the order of the learned Judge is right. Rule 5 of the rules framed under the Indian Companies Act states that the High Court Fees Rules, 1933, as amended from time to time, shall apply to all proceedings under the Act and the rules framed under it, provided that, if the Judge so directs the costs of an Original Petition shall be taxed by the Taxing Officer and the provisions of Order 5, rule 19 of the High Court Fees Rules shall apply to the taxation, or the Judge may himself fix the amount of costs. Therefore the taxation rules of this Court apply to proceedings under the Companies Act or the rules framed under it.

In accordance with rule 73 of the Companies Rules the Judge directed the Official Liquidator to take steps to settle the list of creditors. Rule 74 says that unless the Judge orders that a creditor or a class of creditors shall be admitted without proof, every creditor shall prove his debt. In examining the proof of a debt, the Official Liquidator has to proceed under rule 84 and he may by virtue of rule 88 administer oaths and take affidavits. If a creditor is dissatisfied with the decision of the Official Liquidator, he may appeal under rule 85 to the Judge. In settling the list of creditors, the Official Liquidator acts in a judicial capacity and his order stands subject to the right of appeal to the Judge. This being the case, Order 5, rule 20 applies and the application which the respondent made for the taxation of his bill of costs lay. It is somewhat surprising that the appellant has taken objection to this course. If he had his way, he would put the respondent to the expense of a suit rather than have the dispute as to his fees settled in this simple way.

The appeal fails and is dismissed with costs.

K.C. — *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

K. S. Yelumalai Chetty and another .. *Appellants**

*v.*

Natesachari (died) and others .. *Respondents.*

*Hindu Law—Daughters succeeding to their father—Position of—Powers of alienation—Reversioners when bound by such alienation.*

Under the Hindu law, daughters succeeding to their father take their father's estate as joint tenants and as such are exactly in the same position as if the estate had devolved on co-widows. Any alienation of the estate even if it were for necessary purposes from the point of view of the family would not bind the reversion unless all the daughters joined in the alienation or otherwise gave their consent to it. A mortgagee from one of them gets only her interest in the property and that interest would cease on her death.

*Valluru Appalasuri* v. *Sasappu Kannamma Nayarulu*, (1925) 49 M.L.J. 479, followed.

*Gajapathi Radhamani* v. *Pusapati Alakajeswari*, (1892) L.R. 19 I.A. 184 : I.L.R. 16 Mad. 1 (P.C.) and *Gauri Nath Kakaji* v. *Mt. Gaya Kuar*, (1928) 55 M.L.J. 339 : L.R. 55 I.A. 399 (P.C.), considered.

On appeal from the judgment of Chandrasekhara Ayyar, J., dated 10th July, 1942, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 74 of 1940.

*D. R. Krishna Rao* for Appellants.

*K. Bhashyam, N. Gopala Menon, P. S. Ramaswami Aiyangar, T. R. Srinivasa Aiyar, M. A. Srinivasan* and *V. Varadaraja Mudaliar* for Respondents.

The Judgment of the Court was delivered by

*The Chief Justice.*—This is a suit by the reversioners to the estate of one Arcot Annamalai Chetti, who died on the 2nd December, 1880, for the recovery of the properties left by him, all of which were in the hands of alienees at the date of the institution of the suit. The following geneological tree will help in the appreciation of the facts.

Arcot Annamalai Chetti (died 2-12-1880)

Unnamalai Ammal First wife (predeceased her husband).
- Periyathayammal (married to K. Sunder Chetti) (died 4-4-1938).
  - Murugesam (died before 1902)
    - Nallu.
  - Elumalai (1st plff. born (10-10-1891)
    - Annamalai Devaraj.
    - Daughter.
  - Veeraraghavan (*alias* Raghavan) (2nd plff. born 10-11-1899).
  - Bhanammal.
- Chinnathai Ammal (married to K. Sunder Chetti) (died 1899 or 1900).
- Ratnammal (married to Namasivaya Chetty) (died 1937)
  - Dhanukoti (died 1932).
    - Pattammal (12th deft.)
    - Apurupammal (13th Deft.).
  - Kannappa (died 1922).
  - Rajammal

Amirthammal Second wife (died 2-1-1901)
- Swarnammal (married to Kuppu Chetti died before 1901)
  - Loganathan (died in 1915).

The plaintiffs claimed to be entitled to the properties described in the schedules A and B of the plaint. In the trial Court it was held that the plaintiffs had established their claim to the properties described in schedule B and to one item in Schedule A. The properties described in schedule A are eight in number. The one property in respect of which the plaintiffs succeeded was item No. 8. The plaintiffs have appealed in respect of the other properties mentioned in schedule A. Items Nos. 3, 4 and 5 stand together, as do items Nos. 1, 2, 6 and 7. The learned Judge (Chandrasekhara Ayyar, J.) held that the plaintiffs were not entitled to the possession of items Nos. 3, 4 and 5 because it had not been proved that they belonged to the

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* O. S. A. No. 45 of 1942. 25th January, 1944.

estate of Annamalai Chetti at the time of his death. He rejected the plaintiffs' claim in regard to items Nos. 1, 2, 6 and 7, because he considered that they had been lawfully alienated by Ratnammal. We agree with the judgment of the learned Judge so far as it concerns items Nos. 3, 4 and 5, but we are unable to concur in it in so far as it concerns items Nos. 1, 2, 6 and 7.

Annamalai Chetti, in conjunction with his mother-in-law Sundarammal, purchased items Nos. 3 and 4 in 1862. The Collector's Certificate was issued in their names in 1867. On the 20th November, 1880, Annamalai Chetti transferred his half share to his mother-in-law, who thereby became the sole owner of these properties. She transferred them to K. Sundaram Chetti, Annamalai Chetti's son-in-law, on the 13th February, 1884, and caused the Collector's Certificate to be issued in his name. Having got the title to these properties Sundaram Chetti (together with his wives and son) mortgaged them under documents dated the 29th October, 1897, and the 16th February, 1899. These mortgages were in the English form and each contained a power of sale, which was exercised on the 8th June, 1914. The purchaser was one Jayaram Chetti and his successors in interest are the third and fourth defendants. Item No. 5 was bought by Annamalai Chetti and his son-in-law, Sundaram Chetti, on the 11th March, 1876. On the 20th November, 1880, Annamalai Chetti transferred his half share to his daughter Periya Thayammal. On the 2nd July, 1896, Periya Thayammal and her husband Sundaram Chetti mortgaged the property to the Hindu Jananukula Saswatha Nidhi. Sundaram Chetti was also married to Periya Thayammal's sister, Chinna Thayammal and she joined in the mortgage as did Murugesa, Periya Thayammal's son. This mortgage was also in the English form and contained a power of sale which was exercised on the 28th April, 1904. The purchaser was one Abbu Chetti, who mortgaged the property to the Nidhi on the 30th April, 1904. This mortgage likewise contained a power of sale which was eventually exercised and the property was purchased by the predecessor in title of the fifth defendant on the 20th January 1912.

The case for the plaintiffs with regard to items Nos. 3, 4 and 5 is that in C. S. No. 164 of 1906 of this Court, it was held that the properties belonged to the estate of Annamalai Chetti. That suit was instituted by Ratnammal to recover possession of her share in her father's properties. The defendants were her sister Periya Thayammal, Abbu Chetti (Periya Thayammal's son-in-law), who was in possession of two items of property, Kuppu Chetti (the husband of Swarnammal, Annamalai Chetti's daughter by his second wife) who was in possession of one item of property, and eleven other persons who were in possession of the properties described in the B schedule to the plaint. The action resulted in Ratnammal being placed in possession of certain properties belonging to her father and Periya Thayammal in possession of other of his properties. It is said that the decision in this suit that items Nos. 3, 4 and 5 belonged to Annamalai Chetti operates as *res judicata* ; but this contention was rejected by the learned trial Judge and we consider rightly rejected. Ratnammal was merely asking for the possession of her share of the properties and the plaintiffs in the present suit can only recover what belonged to Annamalai Chetti at the time of his death. As we have shown Annamalai Chetti had parted with his interest in these three items before his death. The validity of the transfers has not been questioned before us and the Court is entitled to draw the presumption allowed by section 90 of the Indian Evidence Act. The transfers made by Annamalai Chetti conferred complete titles on the transferees and the mortgages which eventually led to the sale of the properties to the predecessors of the third, fourth and fifth defendants were valid. In these circumstances the plaintiffs have no claim whatsoever to these properties.

The learned Judge decided against the plaintiffs in respect of items Nos. 1, 2, 6 and 7 because he considered that Ratnammal had power to mortgage the properties without the consent of her sister Periya Thayammal and that it had been shown that the mortgages were created for legal necessities of the family. We shall

presently deal with the question whether these mortgages were created for a family purpose and the effect of the deeds, but before doing so we must indicate our reasons for dissenting from the learned Judge's opinion that Ratnammal acting alone could bind the reversioners.

Periya Thayammal and Ratnammal were joint tenants of their father's estate and as such were exactly in the same position as if the estate had devolved on co-widows. In *Gajapathi Radhamani* v. *Pusapati Alakarjswari*[1], the Privy Council held that where a widow without the consent of her co-widow mortgages a part of the estate to which they are jointly entitled by inheritance from their deceased husband, the mortgage does not affect the interest of the other widow in the property and consequently when the other widow becomes entitled to the whole estate by reason of survivorship, she is unaffected by the mortgage. The fact that the mortgage was entered into to meet a family necessity did not alter the position. In *Valluru Appalasuri* v. *Sasapu Kannamma Nayuralu*[2], a Bench of this Court (Ramesam and Venkatasubba Rao, JJ.), held that when the estate is in the hands of co-widows an alienation made for a family necessity does not bind the reversioner unless both the widows have joined in. This opinion was dissented from by the Allahabad High Court in *Jai Narain Singh* v. *Munna Lal.*[3] In that case, co-widows divided their husband's estate between them and one of them alienated a considerable part of her share. The alienation was for a legal necessity. The Allahabad High Court held that the widow was competent to alienate without the consent of her coparcener and that the alienation bound the reversioner. The other widow was in fact a consenting party but even if she had not consented the Court considered that the reversion would have been bound.

The Privy Council considered both *Valluru Appalasuri* v. *Sasapu Kannamma Nayuralu*[2] and *Jai Narain Singh* v. *MunnaLal*[3], in *Gauri Nath Kakaji* v. *Mt. Gaya Kuar*[4], and expressed disapproval of the Allahabad decision. In delivering the judgment of the Board, Lord Salvesen observed that each widow can deal as she pleases with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. Their Lordships left open the question whether the reversion would be bound where it was necessary to raise money for a family purpose and one widow, having been asked to concur, unreasonably refused. That question does not arise in the present case. Ratnammal neither sought nor got the consent of Periya Thayammal to the mortgages which she created.

Chandrasekhara Ayyar, J., considered that *Gajapathi Radhamani* v. *Pusapati Alakajeswari*[1] and *Valluru Appalasuri* v. *Sasappu Kannamma Nayuralu*[2], did not apply in a case like the present because the judgment in *Gauri Nath Kakaji* v. *Mt. Gaya Kuar*[4] contains this statement :

> "It may be noted that the case arose not between the survivor of the widows and the mortgagee but between the mortgagee and the reversioner after the death of both widows."

The statement was made in connection with their Lordships' criticism of *Jai Narain Singh* v. *Munna Lal*[3], and they were merely pointing out that what the Allahabad High Court said was *obiter*. They added, however, that the opinion was not consistent with the judgment of the Board in *Gajapathi Radhamani* v. *Pusapati Alakajeswari*[1].

We are asked to ignore *Gajapati Radhamani* v. *Pusapati Alakajeswari*[1] because that suit was one between widows and this suit is between reversioners and alienees and to ignore *Valluru Appalasuri* v. *Sasapu Kannamma Nayuralu*,[2] because it was not necessary in that case to decide whether both widows had to join in a mortgage in order to bind the reversion. We consider that the logical conclusion to be drawn from *Gajapati Radhamani* v. *Pusapati Alakajeswari*[1], is that co-widows must join in order

1. (1892) L.R. 19 I.A. 184 : I.L.R. 16 Mad. 1 (P.C.).
2. (1925) 49 M.L.J. 479.
3. (1927) I.L.R. 50 All. 489.
4. (1928) 55 M.L.J. 339 : L.R. 55 I.A. 399 (P.C.).

to bind the reversion. It may be pointed out that the appellant-widow died during the pendency of the appeal before the Privy Council and the reversioner was substituted as the appellant. While it may be that the opinion expressed in *Valluru Appalasuri* v. *Sasapu Kannamma Nayuralu*[1], that in order to bind the reversion the co-widows must join in the transaction was *obiter* it was expressed after a careful consideration of the authorities and we agree with it. Inasmuch as Periya Thayammal did not join in or give her consent we must hold that the mortgages created by Ratnammal, even if they were necessary from the point of view of the family, do not bind the reversion.

We will now examine the facts. The mortgages created by Ratnammal were five in number and they were all in favour of one Swami Chetti. Ratnammal joined as a mortgagor Dhanakoti, the elder son of her deceased sister Chinna Thayammal. Dhanakoti was one of several presumptive reversioners. His execution of these deeds did not, however, add anything to the title of the mortgagee. The first mortgage was on the 11th April, 1906, and was entered into as security for a sum of Rs. 1600 which Ratnammal had borrowed from Swami Chetti. It contains this recital :

> " Whereas the mortgagors aforesaid are in need of moneys for the discharge of their debts which have been all incurred for their family purposes and for the carrying on of a suit or suits for the recovery of possession of their share in all the properties movable and immovable belonging to the late Annamalai Chetti and whereas the mortgagors have applied to the mortgagee for a loan of Rs. 1,600 repayable with interest at 18 per cent. per annum on the security of their right, title and interest in all the properties aforesaid and the mortgagee has agreed to grant the said loan now this indenture witnesseth . . . ."

In accordance with this recital the operative part merely charged the right, title and interest of the mortgagors. All that Ratnammal possessed was a life estate, joint with her sister. Dhanakoti had no right in the properties at all. The other mortgages were created on the 24th August, 1906, 29th January, 1908, 1st August, 1908 and 6th April, 1909, respectively. The amounts raised were two sums of Rs. 300, one of Rs. 200 and another of Rs. 800. According to the recitals in the deeds, these sums were borrowed for the purpose of Ratnammal's suit. In every case the security offered and accepted was the right, title and interest of the mortgagors. We cannot regard these documents as showing that the moneys were required for family necessity ; but even if they were, all that the mortgagee got was Ratnammal's interest in the property, and that interest ceased on her death in 1937.

Swami Chetti brought a suit to enforce these mortgages and on the 16th January, 1930, he obtained a decree. This was never executed, but items Nos. 1, 2, 6 and 7 were sold by Ratnammal on various dates for the purpose of discharging the mortgage decree. The successors-in-interest of the purchasers are defendants 1, 2, 5 and 6. In the circumstances detailed they cannot be allowed to remain in possession of the properties. The properties belonged to the estate of Annamalai Chetti and the plaintiffs are entitled to them. The result is that the decree of the the trial Court will be amended by the insertion of a declaration, that the plaintiffs are entitled to items Nos. 1, 2, 6 and 7 and a direction that possession be given to them with mesne profits from the date of the death of Periya Thayammal, that is from the 4th April, 1938.

The alienees have claimed that they have effected improvements to the properties and an issue (issue II) was framed on this question. In the Court below it was decided that this issue should be determined by the Official Referee. The inquiry before him will of course include the claim of the first, second, fifth and sixth defendants to improvements in respect of items Nos. 1, 2, 6 and 7.

The plaintiffs are entitled to their costs in this Court and below in respect of items Nos. 1, 2, 6 and 7 as against the first, second, fifth and sixth defendants. They

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1. (1925) 49 M.L.J. 479.

will pay the costs here of the third, fourth and fifth defendants in respect of items Nos. 3, 4 and 5.

ORDER.—The draft decree is in order. What this Court decided was that the alienees should have the value of the improvements effected by them and the amount was to be determined by the Official Referee.

V.S. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADAS.

PRESENT :—MR. JUSTICE KING.

Yedlapalli Mangamma and others .. *Appellants**

*v.*

The Maharajah of Pithapuram .. *Respondent.*

*Madras Estates Land Act (I of 1908), sections 163 and 77—Suit for arrears of rent and damages on foot of trespass—Filing of suit in proper Court—Claim barred as regards amount claimed as damages—Matter is governed by section 163 attracting the provisions of section 77—Limitation Act (IX of 1908), section 14.*

A suit for money originally filed in the Sub-Court in March 1936, as a small cause suit was directed to be filed before the Revenue Court. The order was confirmed by the High Court and the suit was thereupon presented before the Deputy Collector in January, 1939. In the suit the plaintiff asserted that all the defendants were trespassers on land belonging to him. Some of the defendants were trespassers in the technical sense because of their having lost their status as ryots after their holdings had been sold for arrears of rent. The rest were trespassers in the usual sense. The Deputy Collector held that the suit was barred by limitation. On appeal to the District Judge, it was remanded for determination on the merits. Against the order of remand an appeal was presented.

*Held,* that section 163 of the Estates Land Act was the only section that applied to the circumstances of the case ; that an application to recover money which is equal to the actual rent on the land should be treated as if it were a suit under section 77 ; that on the relevant dates so far as the present case was concerned the suit would be in time with regard to the rent for fasli 1342, but out of time, with regard to any extra sum claimed as damages in respect of the trespass.

*Held further* that the plaint when actually presented before the proper Court was no doubt out of time but in the circumstances of the case, in the absence of a charge of lack of good faith, section 14 of the Limitation Act may be applied and the suit held to be in time in respect of the rent for fasli 1342 when it was filed before the Deputy Collector.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in A. S. No. 198 of 1941, prefereed against the decree of the Court of the Deputy Collector of Amalapuram in R. S. No. 113 of 1939.

*K. Bhimasankaram* for Appellants.

*Ch. Raghava Rao* for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal brought by defendants 17 to 20 in a suit which originally began as a small cause suit filed by the plaintiff in the Court of the Subordinate Judge of Amalapuram in 1936. It was returned by the Subordinate Judge for presentation before the Revenue Court and this order was confirmed on revision by the High Court. It was consequently presented again before the Deputy Collector, Amalapuram in January, 1939. The basis of the suit was an assertion by the plaintiff that all the defendants were trespassers on certain land belonging to him. Some were trespasserts in the possibly technical sense that they had been ryots and they had lost that status because their holdings had been sold in discharge of the arrears of revenue which they owed. Others were trespassers in the more usual sense of the word. The learned Deputy Collector held that the suit before him was barred by limitation. There was an appeal by the plaintiff to the learned District Judge of East Godavari. The learned Judge differed from the Deputy Collector on the question of limitation and remanded the suit for determination on its merits. One point which was raised in opposition to the appeal was that the suit had already been abandoned by the plaintiff as regards certain of the defendants.

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* A. A. O. No. 527 of 1942. 23rd September, 1943.

That matter was not decided by the District Judge, but in passing the order of remand he referred it for decision to the Court below. Against this order of remand the present appeal has been filed by defendants 17 to 20.

The question, has, of course, now been settled that the suit filed by the plaintiff was not maintainable in the Civil Court. The question then arises as to under what provisions of the Estates Land Act is he entitled to claim money from the defendants and it is conceded in the argument before me that the only section of the Estates Land Act which applies to these circumstances is section 163. Section 163 definitely deals with a person who is not a ryot in respect of the land which is the subject matter of the suit and it provides that where any one has unauthorisedly occupied any of the landholder's property he shall be liable to pay the rent due on the land if that rent has been fixed, and if it has not been fixed, the Collector may on application determine what is a fair and equitable rent. The trespasser is also liable under the second portion of the section to pay in addition to the rent whatever is a fair sum as damages for his unauthorised occupation. The final provision of the section is that all sums due under it can be recovered as if they were arrears of rent. It is provided, however, in the schedule to the Act, Part B, that an application to the Collector to determine what is the sum which should be payable in addition to the rent under section 163 can be filed only within one year from the end of the revenue year in which the occupation was made.

Now, on the relevant dates in this matter it is quite clear that any application under section 163 to determine the amount payable as damages in addition to the amount of the rent would be out of time when this suit was first filed in March, 1936. The question then however remains whether the plaintiff can claim the year's rent for fasli 1342 under the first part of section 163. So far as that is concerned, there is no separate provision in the schedule with regard to limitation, but it seems clear that as the landholder may recover all sums due under section 163 as if they were arrears of rent, an application to recover a sum of money which is equal to the actual rent for the land should be treated as if it were a suit under section 77, and for such a suit, the period of limitation is three years. It is clear therefore that in the circumstances of the present case, any suit or application filed on the 28th March, 1936, which is the date of the present plaint, would have been in time with regard to the rent for the fasli, but out of time, as already mentioned with regard to any extra sum claimed as damages. The present plaint was, of course, presented before the proper Court only in January 1939 and by that time it was on the face of it barred by limitation. This is a case therefore which must in ordinary circumstances be considered with regard to the provisions of section 14 of the Limitation Act. Neither of the Courts below seems to have paid any attention to section 14 of the Limitation Act, but it may, I think, be fairly taken that both Courts would have been prepared to condone the delay under section 14, and have not specifically done so merely because no serious question was raised on this point by the other side. The only reason why the benefit of section 14 should be refused to the plaintiff here would be one depending upon his absence of good faith, and as no facts have ever been alleged by the defendants impugning the good faith of the plaintiff, it seems to me that I may formally set right the omission in the discussion in the Courts below, and hold that in the circumstances of this case, section 14 may be applied and that the suit was still in time when it was filed before the Deputy Collector on the 19th January, 1939.

It is clear from the plaint that there has been no separation of the plaintiff's claim into two portions. The plaint was originally filed in the Civil Court and has now to be considered as a plaint under section 163. The learned advocates who have appeared in this appeal are unable to inform me what exactly is the amount of rent due for fasli 1342, and I am therefore unable to say specifically in respect of what sum this plaint is in time and in respect of what sum the plaint is barred by limitation. It will be for the Court below to apply the decision of this Court to the figures which will be furnished before it and for the same reason

it will be necessary for the Court below to determine as to how the costs of this appeal shall be dealt with. As indicated in this judgment, the appeal is being allowed in part and dismissed in part. The provision in the order of remand that the lower Court shall determine as against which defendants the suit has been abandoned is confirmed and the order of remand itself is of course confirmed subject to the restriction that the decision of the learned District Judge that the suit is in time must apply only to the claim for the rent for fasli 1342. The provision in the order of remand that the costs before the District Judge shall abide and follow the result of the remand is also confirmed.

K.C. *Appeal allowed.*

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## [THE FEDERAL COURT OF INDIA.]

(On appeal from the Chief Court of Oudh, Lucknow.)

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MOHAMMAD ZAFRULLA KHAN, JJ.

Thakur Raghubar Singh and others .. *Appellants**

*v.*

The King-Emperor .. *Respondent.*

*Government of India Act (1935), sections 49 (2), 100 and 124 (2) and Insurance Act (1938), sections 104 and 107—Offence against Insurance Law—Ordinary executive machinery of a province being put into action in respect of—Validity—Sanction of the Advocate-General under section 107, Insurance Act—Pre-requisites to issue of—Contents and form—Right and scope of the power to challenge the sanction given.*

A complaint expressed to be under section 104 of the Insurance Act, 1938, followed sometime later by a second complaint under the same section, was lodged by the Public Prosecutor of Lucknow, against the managing agents and the general manager of an insurance company, having its head offices in Lucknow, based on the allegation that in the first valuation report of the Company as at 15th of May, 1939, and in its reports and accounts for the period ending the 31st December, 1939, the accused deliberately made false statements. The sanction of the Advocate-General under section 107 of the Insurance Act filed with the first complaint was in the following terms :

" In exercise of the powers conferred by section 107 of the Insurance Act (IV of 1938), I hereby sanction the institution of proceedings (prosecution) by the Government against (the names of accused are set out), for offences committed against Insurance Law." The second complaint after referring to the prior complaint filed as sanctioned by the Advocate-General begged to specifically allege further items falsely shown in the balance sheet and prayed that the accused might be tried in respect of those items also. As the Insurance Act came into force only on the 1st July, 1939, convictions were recorded against the accused only in respect of the false statements in the report and accounts of the company for the period ending 31st December, 1939. On appeal to the Federal Court, it was contended that the executive authority of a province had no authority to institute or take part in proceedings in connection with offences created by legislation of the Central Legislature and the general sanction unlimited in the form in which it was given was not valid in law.

*Held*, that though legislation in respect of insurance and the creation of new offences in respect of insurance came exclusively within the legislative powers of the Central Legislature by reason of the provisions of section 100 and List I, items 37 and 42 of the Seventh Schedule to the Constitution Act, it does not follow that section 49 (2) of the Constitution Act prohibits the ordinary executive machinery of a province being put into action in respect of offences created by central legislation unless there be an express prohibition in the legislation itself. There is no force in the suggestion that merely because an offence is created by an enactment of the Central Legislature, operating in the exclusive legislative sphere of the Central Legislature, the provincial authorities responsible for enforcing criminal law are incompetent to prosecute or initiate prosecutions for such offences. There can be nothing *ultra vires* in a Provincial Government taking steps to secure the enforcement of the law in respect of offences created by the Insurance Act or in the Advocate-General of the Province being specified in the Act as the person to control the initiation of proceedings under the Act.

Before sanction is given by the Advocate-General under section 107 of the Insurance Act, he must have proposals before him for the initiation by some person of particular proceedings of a defined nature under the Act against one or more of specified persons and he must sanction the initiation of those proceedings by that person and that if proceedings are initiated by some one other than the person to whom the sanction has been given, or if proceedings subsequently different from those sanctioned are in fact initiated, the provisions of the section are not complied with and there will be no jurisdiction for a Court to entertain the proceedings. The insurers, directors, managers and other persons intended to be protected by the section are entitled to challenge the sanction by the Advocate-General as not having been given to the person who initiates the proceedings or to the particular proceedings initiated against them.

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* Case No. 33 of 1943.

Whilst it is desirable that the sanction should be given in writing and should on the face of it indicate reasonably clearly by statement or reference to other documents, the necessary matters above set out, it is not possible to hold that the section requires any particular form of sanction or even that it should be always in writing. What is necessary is that if challenged by a defendant or accused person, the plaintiff or the prosecutor should be able to establish to the satisfaction of the Court that the requisites of the sanction have been complied with in respect of the sanction on which he relies, so that the Court can be satisfied that it has jurisdiction to entertain the particular proceedings before it.

It is not the right view to take that the generality of the form of sanction in question justified the further charges in respect of later matters inasmuch as the accused were not prejudiced in their defence. A valid previous sanction is essential to the jurisdiction of the Court to entertain the proceedings.

In the circumstances, as the sanction of the Advocate-General was not given in respect of any matters other than those arising out of the first valuation report as at the 15th of May, 1939, but the charges on which convictions were obtained were all in respect of the report and the balance sheet of the 31st December, 1939, there was no valid sanction to the proceedings in which the accused were convicted.

*Rai Bahadur Harischandra* and *Dr. Kailas Nath Katju*, Senior Advocates (with *Radhe Mohan Lal* and *S. B. Bisaria*) instructed by *N. R. Bose*, Agent, for Appellants.

*Dr. N. P. Asthana*, Advocate-General, United Provinces (with *Nasirullah Beg*) instructed by *Sumair Chand Jain*, Agent, for Respondent.

*Sir Brojendra Mitter*, Advocate-General of India (with *H. K. Bose*) instructed by *K. Y. Bhandarkar*, Agent, for Governor-General-in-Council.

The Judgment of the Court was delivered by

*The Chief Justice.*—The Insurance Act of 1938 (Act No. IV of 1938) was enacted by the Central Legislature on the 26th of February, 1938. Section 1 (3) provides that it "shall come into force on such date as the Central Government may by notification in the Official Gazette appoint in this behalf." It in fact came into force on the 1st of July, 1939, under a notification, dated the 1st of April, 1939, in the *Gazette of India.*

The two material sections of the Insurance Act for the purposes of this case are sections 104 and 107, which are in these terms :—

"104. Whoever, in any return, report, certificate, balance sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to one thousand rupees, or with both."

"107. (1) Except where proceedings are instituted by the Superintendent of Insurance, no proceedings under this Act, against an insurer or any director, manager or other officer of an insurer or any person who is liable under sub-section (2) of section 41 shall be instituted by any person unless he has previous thereto obtained the sanction of the Advocate-General of the province where the principal place of business in British India of such insurer is situate to the institution of such proceedings.

(2) This section shall apply in respect of a provident society as defined in Part III as it applies in respect of an insurer."

On the 25th of March, 1942, criminal proceedings were instituted by a complaint expressed to be a complaint under section 104 of the Insurance Act lodged by the Public Prosecutor at Lucknow against the appellants, of whom Nos. 1 and 2 (Thakur Raghubar Singh and Kunwar Surendra Bahadur Singh) were the managing agents and No. 3 (Shyam Singh Rohatgi) the general manager of an insurance company called the All-India United Assurance Company. The head office of this company was at Lucknow. This first complaint was followed up by a second complaint, also expressed to be under the same section, by the Public Prosecutor, dated the 6th of May, 1942.

The first complaint was based on an allegation that both in the first valuation report of the company as at the 15th of May, 1939, and in its report and accounts for the period ending the 31st of December, 1939, both issued over the signatures of the appellants amongst others, the appellants had deliberately made false statements to the effect that contributions were made by them to the company to the

extent of Rs. 30,000. The second complaint was based on allegations of three further false statements in the first valuation report as at the 15th of May, 1939, namely :—

(I) That under the heading "Cash, Cheques and Bank Balances" of the All-India United Assurance Co., as on 15th May, 1939, an amount of Rs. 5,162-13-9 was falsely shown in the balance-sheet although in fact there were no such balances; rather the company had considerably overdrawn from the bank;

(II) That the figures of Rs. 62,903-3-2 as shown under the heading "Advances to Branches" in the same balance-sheet were also falsely shown, as no such advances were given to the branches;

the third not material; and a fourth merely in the following terms :—

"(IV) That in the same way the balance-sheet for the period ending 31st December, 1939, was also false in respect of these items."

The first complaint concluded with the statement that the Advocate-General of the Province had sanctioned the prosecution of the accused as required by section 107 of the Act and that that sanction was filed with the complaint as Annexure (C). The sanction filed with the complaint was in the following terms :—

"In exercise of the powers conferred by section 107 of the Insurance Act (IV of 1938), I hereby sanction the institution of proceedings (prosecution) by the Government against 1. Mr. Shyam Singh Rohatgi, General Manager, and 2. Kunwar Surendra Bahadur Singh Bhadoria and 3. Kunwar Raghubar Singh (Partners of Kunwarji and Co.) Managing Agents, of the All-India United Assurance Company, Limited, Lucknow, for offences committed against Insurance Law."

It is addressed to the Secretary to Government, United Provinces, General Administration Department, Lucknow. It is numbered 1913/I-224 and dated Allahabad, 10th of December, 1941, and is signed by the Advocate-General of the United Provinces.

The second complaint commenced as follows :

"That *as sanctioned by the Advocate-General of the United Provinces* the petitioner has presented a petition in this Hon'ble Court on 25th March, 1942, against the above noted accused for preparing false balance-sheets."

It then proceeded to refer to the fact that in the petition the Public Prosecutor had more specifically referred to the contribution of Rs. 30,000 and then begged specifically to allege the further items referred to above as having been falsely shown in the balance-sheet of the company and prayed that the accused might be tried in respect of these items also.

In due course charges were framed by the City Magistrate against the accused based on these complaints. The City Magistrate in fact framed two separate charges. The first related to the alleged false statements set out in the two complaints as having been made in the valuation report as at the 15th May, 1939, while the second charge dealt with the very vaguely indicated false statements in the balance-sheet and accounts of the 31st of December, 1939. Before the trial was concluded before the City Magistrate it was remembered that the Insurance Act only came into force on the 1st of July, 1939. It was accordingly held that no charges under section 104 of the Act could lie in respect of alleged false statements made in the first valuation report as at the 15th of May, 1939. Convictions were however recorded against the accused on the three charges formulated in respect of alleged false statements in the report and accounts of the company for the period ending 31st December, 1939. These charges were that the accused had wilfully made false statements in the said balance-sheet and accounts knowing them to be false in the following material particulars :—

(1) That a contribution of Rs. 30,000 had been made by them and this amount was shown in the then existing assets of the company;

(2) that a sum of Rs. 4,571-15-9 existed in the funds of the company under the heading "Cash and Bank Balances"; and

(3) that Rs. 43,495-1-6 was the amount of "agents' balances, including branches",

Each of the accused was sentenced to six months' rigorous imprisonment and a fine of Rs. 500 with further rigorous imprisonment for three months in default.

Against this conviction the appellants appealed to the Sessions Judge. On the 1st of July, 1943, the Sessions Judge confirmed the conviction in respect of the Rs. 30,000, and in respect of the " Cash and Bank balances," but held that there had been no wilful false statement in respect of the "agents' balances including branches."

The appellants then applied under sections 435/439 of the Criminal Procedure Code to the Chief Court of Oudh and the matter came before the Hon'ble Mr. Justice Bennett in revision, who gave judgment on the 10th of August, 1943. The learned Judge saw no reason to interfere with the decision of the Courts below on the item " Cash and Bank Balances," but felt some difficulty in regard to the item of Rs. 30,000 contribution and refrained from expressing any definite view thereon. Before Bennett, J., for the first time points were taken on behalf of the appellants as to the interpretation of the Constitution Act in respect of which the learned Judge granted a certificate under section 205 of the Act. On the 13th of August, 1943, the appellants lodged a petition of appeal to this Court based on the questions of interpretation of the Constitution Act and a supplementary petition on the 19th of August, 1943, to be heard by this Court on the merits.

It was not easy to gather exactly what were " the substantial questions of law on the interpretation " of the Constitution Act which were raised and argued in the Court below in respect of which the certificate under section 205 of the Constitution Act was granted, or whether they were the same as those submitted to this Court. This appears to be a case in which considerable ingenuity has been expended to discover some arguable points on the interpretation of the Constitution Act in order to obtain a certificate under section 205 and thereby lay the foundation for an appeal on merits to this Court.

Be this as it may, the arguments submitted were as follows :—

(i) that by virtue of the provisions of section 100 and List I, items 37 and 42, of the seventh schedule to the Constitution Act, Insurance and Offences against Insurance Law are wholly within the legislative sphere of the Central Legislature and no provincial Legislature has power to make laws in respect thereof;

(ii) that by virtue of section 49 (2) the executive authority of a Province is limited to matters with respect to which the Legislature of the Province has power to make laws ;

(iii) that accordingly the executive authority of the Province has no power to institute or take part in proceedings in connection with offences created by legislation of the Central Legislature ;

(iv) that the Central Legislature has no power to put the control of the institution of such proceedings under a provincial officer such as the Advocate-General of the Province, as the executive authority of the Province does not extend to such subjects ;

(v) that section 107 of the Insurance Act indicates that no proceedings are to be instituted except by the Superintendent of Insurance, an officer of the Central Executive, or by a private individual, and that in the section, the word " person " cannot be construed so as to include a Provincial Government, because even if a Provincial Advocate-General can properly be appointed as the controlling authority, he cannot sanction proceedings to be instituted by a Provincial Government as that would be to authorise it to take action in a sphere to which its executive authority does not extend.

That legislation in respect of insurance and the creation of new offences in respect of insurance come exclusively within the legislative powers of the Central Legislature by reason of the provisions referred to is no doubt true. But we are wholly unable to follow how section 49 (2) of the Constitution Act prohibits the

ordinary executive machinery of a Province being put into action in respect of offences created by central legislation, unless there be an express prohibition in the legislation itself. *Prima facie* if a new criminal offence is created by central legislation, it is the right, if not the duty, of everyone to secure the enforcement of that addition to the criminal law of the land in the ordinary way. There is no force in the suggestion that merely because an offence is created by an enactment of the Central Legislature, operating in the exclusive legislative sphere of the Central Legislature, the provincial authorities responsible for enforcing criminal law are incompetent to prosecute or initiate prosecutions for such offences.

It may of course be that the enactment of the Central Legislature may expressly limit initiation of proceedings to officials of the Central Executive or, as here, may require the previous sanction of some other person or authority before proceedings can be commenced in respect of such an offence. It is suggested that it is *ultra vires* for the Legislature to appoint an officer of the Provincial Government as the person to give that sanction. In our judgment, section 124 (2) of the Constitution Act clearly enables the Central Legislature to confer such a power or impose such a duty on an officer of a Province.

It follows that in our judgment there can be nothing *ultra vires* in a Provincial Government taking steps to secure the enforcement of the law in respect of offences created by the Insurance Act or in the Advocate-General of the Province being specified in the Act as the person to control the initiation of proceedings under the Act. Nor would there be any difficulty on this ground in holding that section 107 might authorise the Advocate-General to sanction proceedings to be initiated by his Provincial Government, or some one on behalf of that Government. Whether on other grounds section 107 authorises a sanction by the Advocate-General in favour of a Government, as distinguished from an individual person is another question and arises on the merits. In our judgment there is no substance in any of the points raised on the construction of the Constitution Act.

Turning now to the questions on the merits, on which the Court allowed counsel to be heard on behalf of the appellants, the first point raised by counsel for the appellants was that the proceedings in which the appellants had in fact been convicted had been initiated by the Public Prosecutor at Lucknow without the previous consent of the Advocate-General of the Province to the initiation by him of those proceedings, that this went to the jurisdiction of the Court to entertain the proceedings, and that the whole proceedings were therefore void and must be quashed. The argument was based on the very general form of the sanction given by the Advocate-General on the 10th of December, 1941, and it was contended that there was nothing to show on the face of the document to what possible offences or what possible proceedings, either by reference to the sections under which proceedings were to be taken or by reference to identifiable facts or reports, the Advocate-General had addressed his mind before giving his sanction. It was submitted that a general sanction unlimited in the form in which the sanction in this case was given could not be good in law. The further point was taken that a sanction to the institution of proceedings by the Government was not a sanction to the institution of proceedings by a person within the meaning which should be given to the word "person" in the section.

A study of section 107 indicates (*a*) that it applies to the initiation of all proceedings, civil or criminal under the Act, (*b*) that the proceedings must be against one or more of the persons indicated, that is, an insurer or a director, manager or other person mentioned, (*c*) that no person shall initiate proceedings unless that person has previous to the initiation of proceedings received the sanction to the initiation of *such* proceedings.

It seems clear therefore that before the sanction is given the Advocate-General must have proposals before him for the initiation by some person of particular proceedings of a defined nature under the Act against one or more of the specified persons and he must sanction the initiation of those proceedings by that person,

and that if proceedings are initiated by some one other than the person to whom the sanction has been given, or if proceedings substantially different from those sanctioned are in fact initiated, the provisions of the section are not complied with and there will be no jurisdiction for a Court to entertain the proceedings.

The section appears intended to protect insurers, directors, managers and other persons indicated from the initiation of improper proceedings. Unless the protection is to be worthless, they must, if necessary, be entitled to challenge the sanction of the Advocate-General as not having been given to the person who initiates the proceedings or to the particular proceedings initiated against them.

Whilst obviously it is desirable that the sanction should be given in writing and should on the face of it indicate reasonably clearly by statement or references to other documents the necessary matters above set out, it is not possible in our judgment to hold that the section requires any particular form of sanction or even that it should be always in writing. What is necessary is that if challenged by a defendant or accused person the plaintiff or prosecutor should be able to establish to the satisfaction of the Court that the requisites of the sanctions as set out above have been complied with in respect of the sanction on which he relies, so that the Court can be satisfied that it has jurisdiction to entertain the particular proceedings before it.

In this case the relevant facts are as follows :—

(1) The sanction in the general form in which it was given was given on the 10th of December, 1941.

(2) The charges on which the appellants were convicted were based solely on those portions of the first and second complaints which related to the report and balance-sheet of the 31st December, 1939.

(3) From the record it appears that as early as the 20th of October, 1942, application was made on behalf of the accused for the production of the file of the Advocate-General in order that the appellants might see the application for the sanction of the Advocate-General to the prosecution ; that in response to an order made on the 30th of January, 1943, the file was duly produced, when it was found that it contained no such application but that the application in question was on a file of the Secretariat.

(4) On application to the Secretariat for the production of their file, absolute privilege was claimed by the Government for the file in question ; but an offer was made to the City Magistrate to let him examine it in confidence himself.

(5) This, the City Magistrate appears to have done, but no opportunity whatever was given to the appellants or their representatives to examine this file, nor was any evidence whatever produced in Court to verify the fact that sanction had been given to the particular proceedings initiated by the Public Prosecutor, although the objection as to the validity of the sanction was pressed in each Court.

(6) The file of the Advocate-General (without the application for his sanction on it) was available in the Courts below and was produced in this Court.

(7) From the file of the Advocate-General it appears that—

(*i*) on the 6th of November, 1941, the Advocate-General was under the impression that the documents upon which reliance was to be placed for prosecution were all prepared before the new Act came into force and that he contemplated the prosecution being launched under section 35 of Act VI of 1912. Although under the old Act no sanction of the Advocate-General was necessary, yet as the prosecution was being made then and so that the prosecution might not fail on technical grounds he sanctioned the prosecution ;

(*ii*) on receipt of some further note (not on the file) from the Adviser to Government, Home Department, the Advocate-General accorded the sanction to the prosecution of all the three appellants and forwarded the formal consent in the form set out above.

The Advocate-General, though invited to do so, could not after this lapse of time throw any further light on the matters as indicated by his file.

On the materials before us it is impossible to be satisfied that the sanction of the Advocate-General was given in respect of any proceedings other than proceedings which might have been brought under the Act of 1912, that is, in respect of matters arising out of the first valuation report as at the 15th of May, 1939. The charges on which the convictions were obtained were all in respect of the report and balance-sheet of the 31st of December, 1939. When objection was pressed to the validity of the sanction, it was the duty of the prosecution to establish that proper sanction had been obtained to the proceedings before the Court, so as to give the Court jurisdiction. Unfortunately it appears not to have been considered in the Court below that the question of sanction might go to the jurisdiction to entertain the proceedings. Both the Court and the prosecution appear to have thought that the generality of the form of sanction might justify the further charges in respect of the later matters so long as the appellants were not prejudiced in their defence and the Court was of opinion that the appellants had not been so prejudiced. In our judgment this is not the right view to take of the matter. A valid previous sanction is essential to the jurisdiction of the Courts to entertain proceedings.

For the reasons indicated, there was in our judgment no valid sanction to the proceedings in which the appellants were convicted.

In the circumstances, it is unnecessary to determine whether the Public Prosecutor who initiated the proceedings was authorised so to do by a sanction to the initiation of proceedings by Government and addressed to the Secretary of Government. But at the same time we desire to make it quite clear that on any individual who initiates proceedings, whether an officer or not of a Provincial Government, lies the obligation to establish that he has a sanction from the Advocate-General for the initiation by him of those proceedings.

It is equally unnecessary and in the circumstances wholly undesirable that we should refer to any other matter on the merits, whether the same was or was not debated before us. We allow this appeal, direct that the case may be remitted to the Chief Court, and declare that in place of the conviction recorded against the appellants an order should be made quashing all the proceedings for lack of jurisdiction. The appellants will be released from their bail, and the fines, if paid, will be directed to be refunded.

We make no order as to costs.

V. S. —————— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Chirayath Konikkara Palu *alias* K. V. Paul .. *Appellant**

*v.*

Venkittarama Pattar's son Easwara Ayyar .. *Respondent.*

*Malabar Tenancy Act (XIV of 1930), section 33—Scope.*

A usufructuary mortgagee is not a tenant within the meaning of the Malabar Tenancy Act.

A person who claims the benefits of section 33 of the Malabar Tenancy Act, must not only be a tenant on the date of the application but must be a tenant throughout the required period of ten years of continuous occupation.

Where a person was an usufructuary mortgagee for 8 years and a lessee for 5 years,

*Held,* that he was not entitled to the benefit of section 33 of the Malabar Tenancy Act.

*Thethalam* v. *Eralpad Raja, Calicut,* ((1917) 32 M.L.J. 442 : I.L.R. 40 Mad. 1111, followed.

Appeal against the decree and judgment of the Court of the Subordinate Judge of Palghat in A. S. No. 1 of 1943, dated 30th March, 1943, preferred against

* A. A. A. O. No. 179 of 1943 and A. A. O. No. 435 of 1943. 3rd January, 1944.

the Order of the Court of the District Munsiff of Palghat in I. A. No. 405 of 1942, dated 18th November, 1942, in O. S. No. 5 of 1942, etc.

*D. A. Krishna Variar* for Appellant.

*P. S. Narayanaswami Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—The question in C. M. S. A. No. 179 of 1943 is whether the appellant—and the appellant is the same in both appeals—is entitled to the benefits of section 33 of the Malabar Tenancy Act. Section 33 of the Act is as follows:

"In any suit for eviction relating wholly or in part to a kudiyiruppu, which has been in the continuous occupation of a tenant or the members of his family for ten years on the date of the institution of the said suit, such tenant shall be entitled to offer to purchase the rights in the kudiyiruppu, of the landlord who seeks to evict him, at the market price on the said date."

The kudiyiuruppu in question in this appeal is a very small part of a large property mortgaged to the plaintiff-respondent by the holder of a permanent lease from the landlord. The mortgage was a usufructuary mortgage and the respondent brought the suit out of which this appeal arises to evict the appellant and his mortgagees from the kudiyiruppu.

A certain Ramanatha Aiyar held a permanent lease of the suit kudiyiruppu from the respondent's mortgagor and he gave an oral lease of the kudiyiruppu to one Velu Pillai who in his turn in 1929 executed a usufructuary mortgage in favour of the appellant. In 1937 he assigned his lease to the appellant. The position therefore of the appellant—and the dates are relevant to the decision of this appeal—was that he was a usufructuary mortgagee in possession of the suit kudiyiruppu from 1929 to 1937 and from 1937 to the date of suit in 1942 he was the assignee of the lease. The learned Subordinate Judge dismissed the application and consequently remanded the suit for the ascertainment of the value of the improvements on the ground that a usufructuary mortgagee was not a tenant within the meaning of the Malabar Tenancy Act and that consequently the appellant had not been in continuous occupation of the kudiyiruppu for a period of ten years so as to entitle him to the benefits of section 33.

Learned counsel for the appellant concedes that on the decisions, the learned Subordinate Judge was right in his view that an unufructuary mortgagee was not a tenant within the meaning of the Malabar Tenancy Act. He argues however that in the present case the appellant from 1929 to 1937 was a tenant because a privity of estate between himself and Ramanatha Aiyar was created by the usufructuary mortgage since by reason of it he was liable to pay rent to Ramanatha Aiyar. This contention is based on English decisions which need not be referred to. It cannot be sustained in the light of the decision of a Bench of this Court in *Thethalan* v. *Eralpad Raja, Calicut*[1]. The appellant would not have been liable to pay rent to the landlord of his mortgagor.

It has also been argued by learned counsel for the appellant that, even if the appellant was not a tenant within the meaning of the Act between 1929 and 1937, he would still be entitled to the benefits of section 33 for the reason that he was a tenant when he made the application in 1942 and had been, on the date of his application, in continuous occupation for more than ten years. This contention appears to receive some support from Govindan Nair's Commentary on the Malabar Tenancy Act. On page 402 it is stated that what is required is ten years continuous occupation and that a change in the character of the possession will not affect any break in the occupation. From the illustration given, the view of the author would seem to be that, provided there has been continuous occupation for more than ten years there is no necessity for the occupation to have been throughout in the capacity of a tenant. It seems to me that the words "continuous occupation of a tenant" mean what they say and that a person who applies must not only be a tenant on the

1. (1917) 32 M.L.J. 442 : I.L.R. 40 Mad. 1111.

date of the application but must be a tenant throughout the required period of ten years of continuous occupation. This seems to be what the words of the section mean and is in conformity with what may be deemed to have been the intention of the legislature. As learned counsel for respondent points out, if the character of the possession does not matter, it would be possible for a person, who had been in possession as a trespasser for nine years and 364 days but had obtained an assignment of the lease on the day before he made the application, to claim the benefits of the section.

C. M. S. A. No. 179 of 1943 therefore fails, and as the other appeal No. 435 of 1943, which was from the order of remand necessarily follows the result in C. M. S. A. No. 179 of 1943, both appeals must be dismissed. There will be one set of costs in C. M. S. A. No. 179 of 1943. Leave to appeal is refused.

V.P.S. ——— *Appeals dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Gollamudi Venkatappayya .. *Appellant**

*v.*

The Official Receiver, Guntur and others .. *Respondents.*

*Provincial Insolvency Act (V of 1920), sections 28 (7) and 55—Pendency of insolvency petition—Alienation by debtor—Purchase money used to avert Court-sale—Subsequent adjudication—Official Receiver's claim to properties sold—Sustainability.*

The properties purchased by the appellant as well as certain other properties had been brought to sale in execution of a decree obtained against the insolvent debtor before the petition to adjudge him insolvent was filed. They were all sold in execution but during the pendency of the insolvency proceedings the debtor by selling certain properties to the appellant and others raised money and directed the same to be paid into Court for getting the Court sale set aside. The purchasers accordingly deposited the amounts and the sale was set aside. Prior to the deposit by the appellant the Insolvency Court was moved by a creditor to stop the sale in execution of the decree and it passed an order directing the executing Court to proceed with the sale and deposit the sale proceeds to the credit of the insolvency petition. Later on, after the order of adjudication was passed the Official Receiver applied to the Insolvency Court for payment of the amount to him on the ground that the money belonged to the insolvent and that all the creditors were entitled to a share in it, and his application was allowed. Subsequently after having had the sale proceeds paid over to him the Official Receiver claimed a right to the properties as well and sold some of them at an auction sale held by him. The appellant thereupon filed a petition for a declaration that he was entitled to the properties purchased by him.

*Held,* that the appellant obtained no title to the property in view of the provisions of section 28 (7) of the Provincial Insolvency Act, and that he could not claim protection under section 55 of the Act as he knew that the insolvency petition was pending when he agreed to buy the property from the insolvent.

*Held, further,* that the fact that the Official Receiver applied for payment of the money to him on the ground that it was the money of the insolvent and elected to stand by the sale and received the sale proceeds could not prevent him from putting forward his claim to the properties. It could not be said in such a case that the Receiver was thereby avoiding a transaction of which he has had the benefit and which he has adopted.

Appeal against the order of the District Court of Guntur dated 2nd January, 1942, in C. M. A. No. 31 of 1940 preferred against the order of the Court of the Subordinate Judge of Tenali dated 26th January, 1940 and made in C. M. P. No. 746 of 1935 in I. P. No. 87 of 1933.

*B. V. Ramanarasu* for Appellant.

*M. S. Ramachandra Rao* and *M. Subramania Sarma* for Respondents.

The appeal came on for hearing in the first instance before *Kuppuswami Ayyar, J.*, who made the following Order :

This is an appeal by a person who purchased the properties of an insolvent under a sale deed executed subsequent to the filing of the petition to adjudge him an insolvent and prior to the

* A. A. A. O. No. 86 of 1942. 4th November, 1943.

passing of the order of adjudication, against the order on a petition filed under section 4 of the Provincial Insolvency Act for a declaration that he has a valid title to them. The properties which he purchased as well as other properties were brought for sale in execution of a decree obtained against the insolvent debtor before the petition to adjudge him an insolvent was filed. They were all sold in execution, but during the pendency of the insolvency proceedings, the debtor by selling the properties in dispute to the appellant for Rs. 1,750 and by selling other properties for Rs. 4, 250 or so to another person raised Rs. 6,000 and directed the same to be paid into Court for getting the Court sale set aside. The money was accordingly deposited by the appellant and the other purchaser and the sale was set aside. This was on the 20th January, 1935. Fifteen days later the order of adjudication was passed. Even before the appellant deposited the money into the executing Court, the insolvency Court was moved by a creditor to stop the sale in execution of that decree, but the insolvency Court passed an order directing the executing Court to proceed with the sale and deposit the sale proceeds to the credit of the insolvency petition. Accordingly the money paid by the appellant for setting aside the sale was credited to the insolvency proceedings. The Official Receiver applied to the insolvency Court for payment of the amount to him on the ground that the money belonged to the insolvent and that all the creditors were entitled to a share in it. It was stated then by the Official Receiver that the sale to the petitioner was for a fair price and that it was out of the sale proceeds the amount due under the decree was deposited into Court to avert the Court-sale. The insolvency Court overruling the objection of the decree-holder that he was entitled to be paid the entire amount directed the payment of the money to the Official Receiver and he received the amount for distribution to the general body of creditors. Subsequently after having had the sale proceeds paid over to him, the Official Receiver claimed a right to the properties as well and sold some of them at an auction sale held by him. The appellant before this Court thereupon filed a petition out of which this appeal arises for a declaration that he is entitled to the properties. The first Court held that inasmuch as the appellant had notice of the insolvency proceedings before the date of the sale itself, the sale was not valid and that he had hence no valid title to the properties. On appeal, the learned District Judge o {Guntur held that the sale was supported by consideration and that the sale was for the purpose of saving the properties of the debtor from being sold in execution of the decree, but held that it was invalid in view of the fact that the appellant had notice of the insolvency proceedings before the date of the sale itself. The appellant's claim accordingly was disallowed by both the Courts. Hence this appeal.

Before this Court it is stated that even though the appellant had notice, in view of the fact that the Official Receiver applied for payment of the money to him on the ground that it was the money of the insolvent and elected to stand by the sale and received the sale proceeds, he cannot now go behind his election and claim a right to the properties. It is stated by both sides that there are no authorities of this Court on this point. As it is an important question of law, the papers may be placed before my Lord the Chief Justice for considering whether the appeal may be posted before a Bench.

In pursuance of the aforesaid Order of Reference, the appeal came on before the Bench and the judgment of the Court was delivered by

*The Chief Justice.*—This appeal discloses a position of hardship, but after a careful consideration of all the facts we have come to the conclusion that the order of the District Judge must be affirmed.

On the 25th November, 1933, a creditor applied in the Court of the Subordinate Judge of Tenali for the adjudication in insolvency of the second respondent. In O. S. No. 23 of 1933 of the Court of the Subordinate Judge of Bapatla another creditor had obtained a decree against the second respondent for the payment of a sum of about Rs. 5,000 and on the 22nd November, 1933, the decree-holder applied for the execution of his decree by the sale of the immovable properties belonging to the judgment-debtor. The properties were attached and the sale was fixed for the 21st December, 1934. On the 13th of that month certain creditors of the second respondent applied in the insolvency proceedings for an order appointing an interim receiver and this application was granted. The decree-holder appealed to the District Judge, who on the 20th December, 1934, discharged the order. He allowed the sale to proceed but directed that the sale proceeds should be held by the executing Court subject to the orders of the insolvency Court. The sale was held on the day fixed and all the properties were sold . The prices realised were, however, very unsatisfactory. On the 9th January, 1935, the judgment-debtor sold one of the properties to the appellant for the sum of Rs. 1750 and another property to a third party for the sum of Rs. 4,250. On the 21st January, 1935, out of the total sum of Rs. 6,000 obtained from these sales, the judgment-debtor deposited Rs. 5,532-3-0 into the executing Court under Order 21, rule 89, Civil Procedure Code. This sum was sufficient to comply with the provisions of the

section and accordingly an order was passed setting aside the sales. On the 5th February, 1935, the judgment-debtor was adjudicated insolvent on the petition which had been filed on the 25th November, 1933. On the 5th April, 1935, the decree-holder withdrew from Court the Rs. 5,532-3-0; but when the Official Receiver discovered this, he filed an application in the insolvency proceedings for an order directing the decree-holder to repay the amount into Court. He contended that the money was that of the insolvent and the decree-holder was only entitled to share rateably with the other creditors. His application was allowed. The decree-holder appealed to the District Judge without success, and an application filed in this Court in revision was also dismissed.

On the 9th May, 1935, the Official Receiver purported to sell to the third respondent the property which the appellant had bought from the judgment-debtor on the 9th January, 1935. This sale was subject to confirmation by the Insolvency Court. On the 12th July, 1935, the appellant filed an application with the object of obtaining an order declaring his title to this property. This application purported to be under sections 4, 5 and 55 of the Provincial Insolvency Act. The Subordinate Judge held that the appellant had notice of the presentation of the insolvency petition at the time when he purported to buy the property from the insolvent and therefore was not protected by section 55. On appeal the District Judge concurred in this decision, but directed that the appellant should be allowed to prove his claim in insolvency and share in the distribution of the assets. This appeal is from the order of the District Judge.

Mr. B. V. Ramanarasu on behalf of the appellant, has contended that the Official Receiver wishes to avoid a transaction of which he has had the benefit and has adopted. He says that the judgments in *Brewer* v. *Sparro*[1] and *Smith v. Baker*[2], show that he cannot do this. We are unable to accept the argument. The money which the insolvent paid into Court on the 21st January, 1935, in order to have the sales in execution set aside was his own money. He had certainly obtained it by sales which offended against the law of insolvency, but the money had been paid to him on the execution of the registered instruments of sale and when he deposited it in Court it belonged to him. It is said that the Official Receiver obtained benefit by the payment into Court because the prices realised were far below the true values of the properties and if the two properties had not been sold by the judgment-debtor the sales could not have been set aside. This is true, but this does not mean that the transactions were binding on the Official Receiver or that he adopted them. The allegation that the Official Receiver made these sales his own is based on the fact that he referred to them in his application for an order directing the decree-holder to repay the money into Court. This does not bring the case within the principle relied upon on behalf of the appellant. The sale to the appellant conferred no title upon him and because the Official Receiver may have been pleased by what had happened it does not mean that he adopted the sale to the appellant. The fact that he sold the property to the third respondent on the 9th May, 1935, shows that he had not adopted it.

That the appellant obtained no title to the property is quite clear. Section 28 (7) of the Provincial Insolvency Act says that an order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition and therefore all the properties which the insolvent had on the 25th November, 1933, vested in the Official Receiver. These properties included the property sold to the appellant on the 9th January, 1935. The appellant cannot claim protection under section 55 because he knew that the insolvency petition was pending when he agreed to buy the property from the insolvent.

It has been suggested on behalf of the appellant that the transaction must stand until it is set aside. It is not necessary to go into the question whether it was incumbent upon the Official Receiver to apply under section 4 for an order declaring that the transaction conferred no title, because the question of the validity of the

1 (1860) 7 B. & C. 310: 108 E.R. 739. 2. (1873) L.R. 8 C.P. 350.

title conferred on the appellant has been raised by the appellant himself in these proceedings and he can only have his petition granted if he can show that he obtained a legal title, and that he certainly cannot do.

In these circumstances, his petition was rightly dismissed and the appeal must be dismissed. The appellant will, of course, be entitled to prove in the insolvency proceedings for Rs. 1,750 the amount which he paid for the property.

The appellant must pay the costs of the respondents, one set.

B.V.V. — *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Puthiya Purayil Randu Purayil Kuttissan, Karnavan and manager of the tavazhi tarwad and others .. *Appellants**

*v.*

Kunhi Parambath Chambaton Kunhambu and another .. *Respondents.*

*Malabar Law—Junior members of a tarwad in possession of tarwad properties as maintenance holders—Right of an assignee from a junior member to proceed against the tarwad properties for arrears of maintenance due to the assignor—Section 10 of the Mappilla Marumakkatayam Act (XVII of 1939)—Scope of.*

A karnavan cannot overcome the prohibition against upsetting a family arrangement for maintenance purposes simply by granting a lease to a stranger ; but where a stranger holds a decree which is binding on the family, then a mode of enjoyment of the property which is enforceable against the karnavan or other members of the family cannot stand against the claims which the decree-holder has against the family as a whole.

*Ramaswami Pattar* v. *Gopalan,* (1916) 32 M.L.J. 97, followed.

*Parakkal Kondi Menon* v. *Vadakantil Kunhi Penna,* (1864) 2 M.H.C.R. 41, referred to.

Section 10 of the Mappilla Marumakkattayam Act applies only to the execution of decrees by an anandravan for maintenance and not to an assignee from the anandravan.

Appeal against the decree of the District Court of North Malabar, dated 15th September, 1942 in A. S. No. 45 of 1942, preferred against the decree of the Court of the District Munsiff of Kuthuparamba in O. S. No. 65 of 1941.

*K. Kuttikrishna Menon* for Appellants.

*S. Venkatachala Sastri* for Respondents.

The Court delivered the following

JUDGMENT.—The first respondent, who is an assignee of the right of a junior member of a tarwad for arrears of maintenance from the tarwad , filed a suit to recover the arrears. He obtained a decree, and in execution of the decree attached the tarwad properties. Certain junior members of the tarwad, who were in possession of tarwad properties as maintenance holders, then filed the suit out of which this second appeal arises to have the attachment set aside on the ground that the first respondent must satisfy his decree from the other tarwad properties and had no right to bring their properties to sale. The suit failed in both the lower Courts.

The contention that plaintiff-appellants' properties were not liable to attachment and sale was founded on decisions of this Court that the karnavan cannot set aside an arrangement by which junior members of a tarwad have been put in possession of some of the tarwad lands in lieu of maintenance. In an old case *Parakkal Kondi Menon* v. *Vadakantil Kunhi Penna*[1], on the question whether a certain property handed over by the males of the tarwad for the support of a woman was liable in respect of a judgment binding upon the family it was held that, as the karnavan could at any time alter the disposition of family property made for purposes of maintenance, such property was still family property and so liable for a judgment binding on the family. The proposition, namely, that the karnavan can at any time alter the disposition of family property made for maintenance of junior members,

* S. A. No. 149 of 1943. 10th January, 1944.

1. (1864) M.H.C.R. 41.

is admittedly no longer good law. The judgment went on, however, that even "if the family arrangement amounted to a binding contract between the members of the family, such arrangement could in no circumstances have the effect of withdrawing family property from the execution of a decree binding that property." This proposition has not been overruled, and appears to me to be still good law. It was held, no doubt, in *Ramaswami Pattar* v. *Gopalan*[1], that a suit for possession under a lease granted by a karnavan in respect of properties which were already held under a maintenance arrangement by junior members could not be maintained. It seems to me, however, clear that the case of a lessee from the karnavan who seeks to recover properties from maintenance-holders is distinguishable from the case of a person who seeks to sell such property in execution of a decree that is binding on the family. A karnavan cannot overcome the prohibition against upsetting a family arrangement for maintenance purposes simply by granting a lease to a stranger; but where a stranger holds a decree which is binding on the family, then a mode of enjoyment of the property which is enforceable against the karnavan or other members of the family cannot stand against the claims which the decree-holder has against the family as a whole. (*Vide* Sundara Aiyar's Malabar Law, 4th edition, 151). The first respondent, therefore, is not precluded from proceeding against the appellants' properties merely because they held them under an arrangement in lieu of maintenance.

Next it has been argued that under section 10 of the Mappilla Marumakkatayam Act, the first respondent must exhaust his remedy against the personal property of the karnavan or the income of the tarwad property before the immovable property of the tarwad can be brought to sale. The Marumakkatayam Act was passed in 1939; and accordingly, unless section 10 is retrospective in effect—and there is no reason to hold that it is—it will not apply to the case now before me. Furthermore, even if the section had retrospective effect,it applies only to the execution of a decree obtained by an anandravan for maintenance. It has been argued by the learned Government Pleader that as the first respondent is an assignee of the rights of an anandravan to maintenance, for the purposes of section 10 he stands in the shoes of the anandravan himself. This contention cannot be accepted. If it was intended that the provisions of section 10 should apply to the assignee of an anandravan of his right to maintenance, this would have been made clear in the language of the section itself. In my opinion, therefore, the decisions of the lower Courts are correct, and the appeal must be dismissed with costs of the first respondent.

Leave to appeal refused.

V.P.S. *Appeal dismissed.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Koduri Krishna Rao .. *Appellant**

*v.*

Simhadri Venkataramarao .. *Respondent.*

*Hindu Law—Kamsala community—Re-marriage of widows not permitted in the community—Man and woman living together—Presumption of marriage not to be drawn—Illegitimate son to be maintained out of joint family property both before and after putative father's death.*

Re-marriage of widows in the *Kamsala* community is not allowed and hence a woman belonging to the community cannot be presumed to have been legally married to the person with whom she was living, though he also was of the same community.

An illegitimate son of a Hindu is entitled to be maintained from out of the joint family property of the putative father both before and after the father's death.

*Vellaiyappa Chetty* v. *Natarajan*, (1926) 52 M.L.J. 229 : I.L.R. 50 Mad. 340 and *Muniappa Mudaliar* v. *Kuppuswami Mudaliar*, (1942) 1 M.L.J. 181, relied on.

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*S. A. No. 153 of 1943. 10th January, 1944.

1. (1916) 32 M.L.J. 97.

Appeal against the decree of the Court of the Subordinate Judge of Ellore in A. S. No. 21 of 1941 (A. S. No. 305 of 1940, District Court, West Godavari) preferred against the decree of the Court of the District Munsiff of Kovur in O. S. No. 315 of 1939.

*K. Krishnamurthi* and *T. V. Chellapathy Rao* for Appellant.

*P. Somasundaram* and *P. Suryanarayana* for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit for maintenance by two boys who claim to be the illegitimate sons of the defendant. The first Court decreed maintenance for both sons; but the lower appellate Court held that it had not been proved that the elder boy was the son of the defendant. Even with regard to the younger, it reduced the quantum of maintenance granted.

The learned advocate for the appellant puts forward three contentions. The first is that the lower appellate Court has not had regard to the proper presumptions to be made in cases of this kind. The argument of the appellant is that the second son was born during the continuance of the marriage between the mother of the boys and one Narayanamurthy and that the Court should therefore have presumed that both the boys were the sons of the husband of their mother. The lower appellate Court found that the appellant had not proved that the plaintiffs' mother was validly married to Narayanamurthi; but Mr. Krishnamurthi contends that that should have been presumed by the Court. It is dangerous to apply too closely English presumptions in matrimonial matters to the conditions in India. The argument of Mr. Krishnamurthi might have been sound enough if Narayanamurthi had been the only person with whom the plaintiffs' mother had lived, but it is in evidence that she was married when she was young to a man who died leaving her a widow at the age of 14 years. She lived with Narayanamurthi after that. The learned District Munsiff says that re-marriage of widows in the community to which the mother of the plaintiffs belonged, namely, the Kamsala community, is not allowed; and I find from Thurston's "Castes and Tribes of Southern India" that that is the case. One cannot, under these circumstances, presume that Narayanamurthi even though he was of the same community, was legally married to the plaintiffs' mother; he could not have been.

The point with regard to which most of the contest in the second appeal has been urged is whether the second plaintiff is entitled to maintenance throughout his life or only till he attains majority. All the relevant authorities are on one side, though none of them deals precisely with the point raised. It was one of the points that their Lordships of the Privy Council enunciated as coming up for decision in *Vellaiyappa Chetty* v. *Natarajan*[1]; but it was unnecessary for them to discuss that point, because the illegitimate sons had been awarded maintenance only for their lifetime and they had not filed a cross-appeal. The matter was however fully discussed in the judgment of this Court from which the appeal to the Privy Council was preferred, namely, *Vellaiyappa Chetty* v. *Natarajan*[2]; and the point decided in favour of the illegitimate sons. In *Ananthaya* v. *Vishnu*[3], the claim was by an illegitimate son of a Brahmin; and it was held that the illegitimate son was entitled not merely to maintenance until he attained majority but to maintenance for life. As the provisions with regard to maintenance of illegitimate sons of Sudras are generally more liberal than among the regenerate classes, the principle enunciated in *Ananthaya* v. *Vishnu*[3], would apply a *fortiori* to the case of Sudras. Moreover, the ground for awarding maintenance for life was one that would apply equally to all Hindus, as it arose because the illegitimate son had no right to share in the property. Mr. Krishnamurthi points out that these decisions deal with cases in which the father was dead. The right of illegitimate sons to maintenance arises, however, out of their inability to share in the same way as legitimate sons do in the family property; and so in lieu of a share of the family property they are entitled

1. (1931) 61 M.L.J. 522 : L.R. 58 I.A. 402 : I.L.R. 55 Mad. 1 (P.C.).
2. (1926) 52 M.L.J. 229 : I.L.R. 50 Mad. 340.
3. (1893) I.L.R. 17 Mad. 160.

to maintenance. If that is so, then there can be no force in the contention that there is a period between their attainment of majority and the death of their father when they would not be entitled to maintenance, though they were entitled to it before and subsequent to that period. In *Muniappa Mudaliar* v. *Kuppuswami Mudaliar*[1], Venkataramana Rao, J., said that :

"an illegitimate son cannot claim higher rights than a legitimate son. Accordingly, a Hindu father who is not possessed of any joint family property is under no obligation to maintain his adult illegitimate son during his own lifetime."

The father is bound to maintain his minor son irrespective of whether he has any property or not ; but his obligation to maintain an adult son depends upon his possession of joint family property. If he has such, then the illegitimate son is entitled to be maintained out of it both before and after his father's death.

The third point argued is with regard to the quantum of maintenance. I am not satisfied that the rate awarded by the lower appellate Court is too high.

The appeal fails and is dismissed with costs.

K.C. *Appeal dismissed.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Ramaswami Reddiar .. *Appellant**

*v.*

Kuppalagu Pandithan and others .. *Respondents.*

*Provincial Insolvency Act (V of 1920), section 37—Annulment of adjudication—Certain properties vested however in Official Receiver—Official Receiver has power to sell property without express permission of the Court.*

A receiver appointed under section 37 of the Provincial Insolvency Act has only such powers as are necessarily implied by the vesting order and these powers in respect of the property vested in him must be such powers as he had in respect of the insolvent's properties generally before the date of the annulment.

Where the adjudication of the insolvent was annulled, but at the same time certain properties were vested in the Official Receiver by an order of the Court and the Official Receiver sold these properties,

*Held,* that the Official Receiver had power to sell the property vested in him, without the express permission of the Court.

*Chenna Basappa* v. *Official Receiver, Bellary,* (1943) 1 M.L.J. 127 and *Karunakara Menon* v. *Sankara Unni,* (1943) 2 M.L.J. 134, followed.

Appeal against the order of the District Court of Ramnad at Madura, dated 24th December, 1942, and made in C. M. A. No. 8 of 1941 preferred against the order of the Court of the Subordinate Judge of Sivaganga dated 11th October, 1940, and made in I. A. No. 497 of 1938 in I. P. No. 3 of 1935.

*T. S. Vaidyanatha Aiyar* for Appellant.

*A. Sundaram Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The question in this civil miscellaneous second appeal is whether an Official Receiver has power to sell property vested in him by an order of Court passed under section 37 of the Provincial Insolvency Act without the express permission of the Court.

The petitioning creditor in I. P. No. 3 of 1935 in the Court of the Subordinate Judge of Sivaganga is the appellant and the insolvent in that petition is the first respondent. The adjudication of the insolvent was annulled as he failed to apply for discharge, but at the same time certain properties were vested in the Official Receiver by an order of Court. The Official Receiver sold these properties and they were purchased by the appellant. Thereupon the insolvent made an application purporting to be made under various sections of the Provincial Insolvency

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1. (1942) 1 M.L.J. 181.

* A. A. A. O. No. 87 of 1943. 4th January, 1944.

Act and section 151 of the Civil Procedure Code asking that the sales should be set aside. The Subordinate Judge dismissed the application, but the appeal to the District Judge of Ramnad was allowed and the sales were set aside.

The learned District Judge referred to the decision of a Full Bench of this Court in *Veerayya* v. *Sreenivasa Rao*[1] and construed that decision to mean that a receiver in whom property was vested by an order made under section 37 was not empowered to sell those properties except with the permission of the Court. The same question has been considered by Horwill, J., sitting alone in *Chenna Basappa* v. *Official Receiver, Bellary*[2] and he held that the power to sell property and distribute the proceeds must be implied from the vesting order itself. With great respect, I agree that this is the effect of the decision of the Full Bench. The main question which was before the Full Bench was whether the Court had any powers of control at all over the property and the receiver once the order of annulment of the adjudication had been made. The Bench had not to consider whether any particular acts performed by the receiver would be illegal unless the previous permission of the Court had been taken. King, J., no doubt observes in his judgment at page 925 that

> "the person appointed under section 37 has no longer by the mere fact of his appointment the powers which a receiver has under the Act."

But that does not necessarily mean that the appointee will not have by implication the powers which the Official Receiver had previously in respect of the properties vested in him. As King, J., pointed out himself in *Karunakara Menon* v. *Sankara Unni*[3] once an adjudication has been annulled or an absolute order of discharge granted "there is no power in the Official Receiver to institute new proceedings under section 53 or 54 of the Insolvency Act." A receiver appointed under section 37 has therefore no longer all the powers which a receiver has under the Act even if he has all these powers in respect of the property vested in him. The judgment goes on:

> "He has only such powers as are necessarily implied by the vesting order"

and these powers in respect of the property which has been vested in him, it seems to me must be such powers as he had in respect of the insolvent's properties generally before the date of the annulment. There is no reason why they should be either wider or more restricted.

In this view, the decision of the District Judge cannot be upheld. The appeal must be allowed with costs throughout. Leave refused.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Subbarayan Chettiar .. *Appellant**

*v.*

Ameer Moidin Rowthen .. *Respondent.*

*Malabar Tenancy Act (XIV of 1930), section 20 (5)—Suit by jenmi for eviction of kanomdar—Land alleged to be required for cultivation—Proof.*

Where the landlord files a suit for eviction of his kanomdar on the ground that he requires the land for his own cultivation the Court is not bound to decree the suit on the mere statement of the jenmi that he requires the land for his own cultivation. On the other hand it is bound to dismiss his suit unless he satisfies the Court that he genuinely requires the land for his cultivation. The question of intention should in such cases be decided by the Court on the materials placed before it.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in A. S. No. 18 of 1942, preferred against the decree of the Court of the District Munsiff of Palghat in O. S. No. 97 of 1941.

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1. (1935) 69 M.L.J. 364: I.L.R. 58 Mad. 908 (F.B.).
2. (1943) 1 M.L.J. 127.
3. (1943) 2 M.L.J. 134.

*S. A. No. 185 of 1943. 10th January, 1944.

*D. A. Krishna Variar* for Appellant.

*P. Govinda Menon* for Respondent.

The Court delivered the following

JUDGMENT.—The appellant filed a suit for eviction of his kanomdar on the ground that he required the land for his own cultivation under section 20 (5) of the Malabar Tenancy Act. Both the Courts have held against him on this point.

Mr. Krishna Variar contends that when once the landlord tells the Court that he requires the land for his own cultivation, the Court has no discretion but to decree the suit for eviction and that the only remedy of the kanomdar in a case where the claim by the landlord is not *bona fide* and the landlord does not in fact take up the land for his own cultivation is to apply under section 21 (1) to be reinstated; and he quotes *Narikkal Chathan* v. *Kesavan Namboodiri*[1], which overruled S. A. No. 42 of 1938, in support of his contention. Needless to say, the learned Judges in *Narikkal Chathan* v. *Kesavan Namboodiri*[1] said nothing of the sort. On the contrary, the learned Chief Justice states almost at the outset of his judgment that

"the jenmi * * * * may resume occupation if there is a *genuine* intention to cultivate."

Far from allowing the suit upon the jenmi's stating that he requires the land for his own cultivation, the Court is bound to dismiss his suit unless he satisfies the Court that he genuinely requires the land for his cultivation. It is true that it is not always easy to decide what a man's intentions with regard to something that is to happen in the future are ; but the Court has nevertheless to decide the question on such material as it has before it. In the case under consideration the learned Subordinate Judge has devoted the whole of page 3 of his judgment to discussing the circumstances that are relevant and have a bearing on this question whether the appellant requires the land *bona fide* for his own cultivation. It is true, as Mr. Krishna Variar says, that not one point discussed by the learned Subordinate Judge is in itself conclusive ; but it was possible for the learned Subordinate Judge to come to the conclusion he did from the various circumstances discussed throughout that page. I should indeed have been surprised if the learned Subordinate Judge had come to any other conclusion on the material before him.

The appeal is dismissed with costs.

B.V.V. — *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

The Commissioner of Income-tax, Madras .. *Applicant**

*v.*

Aga Abbas Ali Shirazi, Trustee to the waqf of Mirza Mohamed Ali Namazi, Madras .. *Respondent.*

*Income-tax Act (XI of 1922), section 3 (i)—Settlement giving discretion to trustee to devote whole of the income for the benefit of poor relations of settlor—Not a " charitable purpose " within the meaning of the section entitled to exemption from tax.*

A settlement to benefit the poor relations of the settlor cannot be deemed to be a settlement for a charitable purpose within the meaning of section 4 (3) (1) of the Indian Income-tax Act and where the trustees are given the power in their absolute discretion to apply the whole of the income of the trust for that one purpose though some other purposes also had been mentioned, the settlement does not fulfil the requirements of that section.

If the settlor had merely directed that a specified part of the income of the property should be devoted to a purpose which was charitable within the meaning of the section, such part of the income would be exempt from tax.

*Commissioner of Income-tax* v. *Jamal Mohammad*, (1941) 2 M.L.J. 148 : I.L.R. (1941) Mad. 862 (S.B.) and *Bowan* v. *Secular Society, Ltd.*, (1917) A.C. 406, relied on.

1. (1941) 2 M.L.J. 455 : I.L.R. (1942) Mad. 133.

* Referred Case No. 26 of 1943. 28th January, 1944.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Income-tax Act, 1922 (XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (VII of 1939) in Application No. 66 R. A. No. 18 Madras of 1942-43 on its file.

*K. V. Sesha Aiyangar* for Applicant.

*N. Sivaramakrishna Aiyar* for *M. Subbaraya Aiyar* for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—This reference has been made by the Income-tax Tribunal, Calcutta Bench, at the instance of the Commissioner of Income-tax, Madras. The Commissioner contends that the Tribunal failed to appreciate the case put forward by the Income-tax authorities in an appeal by the trustee of the waqf of Mirza Muhammad Ali Namazi in respect of the assessment to income-tax for the year 1940-41. It is evident from a perusal of the order of the Tribunal passed in the appeal that the criticism is well founded.

By a deed dated the 17th January, 1930, Mirza Muhammad Ali Namazi made a settlement of immovable property for the following purposes :

1. For the benefit of his poor relations ;
2. For celebrating Moharram and other religious festivals of the Shiahs ;
3. For the conduct of marriages and burials of poor Mussalmans ;
4. For the benefit of poor Syeds ; and
5. For such other religious, pious or charitable purposes as are allowed by Mussalman law as applicable to Shiahs.

He directed that ten per cent. of the income should be utilised for celebrating the Moharram and other religious festivals, thirty per cent. for distribution among his poor relations and twenty per cent. for the conduct of marriages and burials of poor Muhammadans and for the benefit of deserving Syeds. Then the following provision was made :

> " Provided always that the Muthavallies shall be at liberty from time to time to vary the distribution of the income among the objects of the waqf on unanimous resolution of all the three Muthavallies passed at meetings specially held for the purpose."

Therefore, the trustees in their absolute discretion could, according to the deed, devote the whole of the income to the settlor's poor relations. But a settlement for the settlor's poor relations is not a settlement for a charitable purpose within the meaning of section 4 (3) (1) of the Income-tax Act, as a Full Bench of this Court pointed out in the case of *Commissioner of Income-tax* v. *Jamal Mohammad*[1]. It was there held that a provision of this nature was not a provision for general public utility. It was a provision merely of a private nature, and the section only applies to public charities.

In the course of his speech in *Bowan* v. *Secular Society, Ltd.*[2], Lord Parker of Waddington said :

> " A trust to be valid must be for the benefit of individuals, which this is certainly not, or must be in that class of gifts for the benefit of the public which the Courts in this country recognise as charitable in the legal as opposed to the popular sense of that term. Moreover, if a trustee is given a discretion to apply trust property for purposes some of which are and some are not charitable, the trust is void for uncertainty."

It is common ground that this principle of law applies in India.

The case for the Commissioner of Income-tax is that as the first of the objects for which the settlement was made, namely, the benefit of the poor relations of the settlor, cannot be deemed to be a settlement for a charitable purpose within the meaning of section 4 (3) (1), and as the trustees are given the power to apply

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1. (1941) 2 M.L.J. 148 : I.L.R. (1941) Mad. 862 (S.B.).
2. (1917) A.C. 406.

the whole of the income of the trust for this one purpose, the deed does not fulfil the requirements of the section. This argument is clearly right. The first object is not a charitable object within the meaning of the section and as the whole of the income can be devoted to it, the settlement, so far as the Income-tax Act is concerned, cannot be recognised. If there had not been this discretion given to the trustees and the settlor had merely directed that a specified part of the income of the property should be devoted to a purpose which was charitable within the meaning of the section, such part of the income would be exempt from tax; but that is not the case here.

The answer we give to the question referred is that the assessee was not entitled to exemption from the assessment of any portion of the income of the waqf property. The Commissioner is entitled to his costs, Rs. 250.

K.S. *Reference answered.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE SHAHABUDDIN.

Pedda Thimma Reddy .. *Appellant**

*v.*

Darur Subbarayudu (T.D.H.) and others .. *Respondents.*

*Civil Procedure Code (V of 1908), section 96—Whether points of law depending upon precise facts can be raised in appeal.*

Pure points of law can always be raised; but points of law that depend upon precise facts should not be allowed in appeal.

Where in regard to an execution petition objections were raised by the judgment-debtor, for the first time in appeal, (*i*) regarding the competency of the decree-holder's assignee, who was adjudicated an insolvent to enter on legal proceedings and (*ii*) that notice of the execution was not given to the legal representatives of the decree-holder,

*Held*, that these questions cannot be raised for the first time in appeal.

Appeal against the order of the District Court of Bellary dated 11th April, 1942, and made in E. P. No. 54 of 1940, in O. S. No. 8 of 1929 (O. S. No. 32 of 1929, Sub-Court, Bellary).

*B. Sitarama Rao*, *A. Bhujanga Rao*, and *D. R. Krishna Rao* for Appellant.

*V. S. Narasimhachar* for Respondents.

The Court delivered the following

JUDGMENTS: *Mockett, J.*—The appellant is the second judgment-debtor in O. S. No. 8 of 1929 and the first respondent is an assignee of the decree-holder plaintiff. Two points have been argued before us. The important dates are as follows. The decree in the suit in which E. P. No. 26 of 1930 was filed against the second judgment-debtor was passed on the 28th February, 1930. On the 18th September, 1930, the appellant was adjudicated and E. P. No. 26 of 1930 was dismissed on the 19th September, 1930. On the 11th August, 1933, the decree was assigned to one Subbarayudu. On the 11th August, 1934, the decree-holder died. On the 19th April, 1935, the appellant's adjudication was annulled. On the 24th February, 1938, Subbarayudu was adjudicated and he filed an appeal. His appeal was dismissed. But when he appealed to the High Court an order of stay dated the 19th April, 1938, was passed. We have not seen that order. The appeal was dismissed on the 17th August, 1939. There was therefore from the 19th April, 1938, to the 17th August, 1939, for a period of 16 months a stay order operating. During that period, namely, on the 20th June, 1938, E. P. No. 28 of 1938 was filed by Subbarayudu praying for the arrest of the appellant after recognising the assignment. It was dealt with, with the order "Not pressed, dismissed." It was in time because on the 29th August, 1935, a second petition for adjudication had been filed which was dismissed. But it is conceded by the appellant here that in those proceedings there was an acknowledgment within the Limitation Act which makes

* A. A. O. No. 319 of 1942. 5th August, 1943.

20th June, within time so far as the law of limitation is concerned. On the 27th September, 1940, E. P. No. 54 of 1940, the subject of the present appeal, was filed by Subbarayudu. Objections were taken by the judgment-debtor as follows. It was contended that execution should not proceed without notice to the decree-holder's legal representatives, and as what is described by the lower Court as "a belated objection," it was contended that notice of the execution petition had never been given to the transferor under Order 21, rule 16 of the Civil Procedure Code. The other objection taken was that on the 27th September, 1940, Subbarayudu was an insolvent and therefore his application was not competent. That matter had been dealt with in an order passed by the learned District Judge of Bellary on the 24th February, 1942, in E. A. No. 201 of 1941 in E. P. No. 54 of 1940. In that E. A., the Official Receiver of Kurnool prayed that he might be substituted for Subbarayudu and permission given to continue the execution of the decree. An examination of the learned Judge's order shows that what was the subject of argument before him was whether Subbarayudu being an insolvent on the 27th September, 1940, this order of substitution should be made. But the argument throughout was based on the assumption that the execution petition of the 20th June, 1938, was competent.

Before us now Mr. Sitarama Rao has argued that the execution petition of the 20th June, 1938, was not competent because at that time Subbarayudu was an insolvent. A point of that sort was essentially one which should have been taken before the lower Court. It was most important for example that the order of the High Court in the stay petition should have been exhibited and that the facts relating to the status of Subbarayudu on that date should have been thoroughly investigated. Authorities have been cited to us for the proposition that a person who is an adjudicated insolvent cannot himself enter on legal proceedings as he is represented by the Official Receiver or in this city by the Official Assignee. But this execution petition was filed during a long period when it can hardly be supposed the Court would not have made provision at least for the conduct of his affairs. It is enough for me to say that unless there is evidence before me that at that time there was a prohibition on Subbarayudu's conducting any litigation, I am not prepared to assume that there was any such prohibition in 1938. Had there been, objection would no doubt have been taken if it was valid. This E. P. was disposed of in September, 1938, and it has never been suggested that at that time any objection was taken by the Court. In the absence of clear grounds for holding that any action in filing the execution petition at that stage was on the facts illegal, I am not prepared to make any assumptions in favour of the present appellant. This is one of those points that should not be taken in appeal for the first time. The same observation applies to the second point. Before the learned Judge it will be seen that what was described as "a belated objection" was taken that notice of the execution petition had not been sent to the transferor under Order 21, rule 16 of the Civil Procedure Code. An examination of the counter-affidavit shows that that objection was not in fact taken. So it presumably must have been taken in argument. That again is an objection which depended very largely on the facts. We know that the decree-holder died in 1934 and it was stated by the present respondents that in their execution petition the original decree-holder had no heirs. So far as the appellant is concerned, it is clear that he had knowledge of the transfer, and so from that point of view at least he has been in no way prejudiced. I consider that an objection such as this which depends on the facts should have been clearly taken and the facts established. There is naturally after all these years very little available evidence on this point. There appears to be nothing in the rule which says that the notice must be in writing or in any particular form, and the High Court of Patna has taken the view that it may be oral. An objection based on a question of fact, namely, that a certain formality has not been complied with, should in my view be clearly proved after a long period of years such as has passed in this case more especially when the chief person concerned is dead and has ne heirs. I think that the learned Judge was right in not allowing this point to be

taken at so late a stage. So far as I am concerned I can only say that I have not got before me the necessary information to decide it. The fact is that the present appellant is relying upon every possible technical objection that the law allows to save him from paying his debts and as so frequently happens, the more arguable points are only thought of when they come to this Court as pure points of law can naturally always be raised. But points of law that depend on precise facts should not in my opinion be allowed. There is no reason for holding that the lower Court's order was wrong on the facts before it.

In the result, therefore, I would dismiss this appeal with costs of the first respondent.

*Shahabuddin, J.*—I agree.

V.P.S. *Appeal dismissed.*

## [PRIVY COUNCIL.]

[On Appeal from the High Court of Judicature at Bombay.]

PRESENT :—LORD ATKIN, LORD THANKERTON, LORD PORTER, LORD CLAUSON AND SIR GEORGE RANKIN.

Morarji Goculdas and Co. .. *Appellants**

*v.*

The Sholapur Spinning and Weaving Co., Limited and others .. *Respondents.*

*Company—Managing agents—Termination of employment of—Misconduct, that would justify—Quarrels among the partners constituting the firm of managing agents sufficient.*

On the contention that the principle governing the termination of the services of a servant by his master for misconduct would not apply to the termination of the services of the managing agents of a company by such company,

*Held*, that the contention involved a wrong approach to the question. In each case the question must be whether the misconduct proved, or reasonably apprehended, has such a direct bearing on the employer's business, or in the discharge by the employee of that part of the employer's business in which he is employed, as to seriously affect or to threaten to seriously affect the employer's business, or the employee's efficient discharge of his duty to his employer. The nature of the particular business and the nature of the duties of the employee, will require to be considered in each case in order to arrive at a just conclusion on the question, but the principle remains the same.

In the circumstances of the case, the quarrels between the partners constituting the firm of the managing agents of the company, were such as to justify the termination of their employment.

*D. N. Pritt, K. C.* and *W. W. K. Page* for Appellants.

*Sir Herbert Cunliffe K. C.* and *S. P. Khambatta,* for Respondents.

Their Lordships' Judgment was delivered by

LORD THANKERTON.—The appellants, who are a merchant firm carrying on business in Bombay, seek to recover damages from the respondents in respect of the alleged wrongful termination of their employment as managing agents of the respondent company. By judgment and decree dated the 12th October, 1938, the High Court of Judicature at Bombay, in its Civil Appellate Jurisdiction, affirmed the judgment and decree of that Court in its Original Civil Jurisdiction, dated the 15th February, 1938, by which the suit of the appellants was dismissed with costs.

The respondent company is a joint stock company carrying on business at Bombay as spinners and weavers of cotton, jute and other fibres ; the individual respondents, along with two other original defendants now deceased, were the directors of the respondent company who passed the resolution, dated the 27th January, 1933, which terminated the employment of the appellants as managing agents of the respondent company.

The respondent company was formed in 1874, and by clause VI of the memorandum of association it was provided as follows :

"That the firm of Morarji Goculdas and Co., of Bombay, merchants, or whatever member or members that firm may for the time consist of, shall be the agents of the company, so long as the said firm shall carry on business in Bombay or until they shall resign, and they shall receive a commission

* P. C. Appeal No. 39 of 1942. 21st October, 1943.

of ¼ anna per lb. on all the yarns and other material manufactured and sold by the company; should however the company during any one year be unable to declare a dividend of 4 per cent. owing to their profits being less than that amount, the agents shall only be paid one-third of the above commission."

In 1931, important changes were made in the partnership of the appellant firm, out of which arose the troubles which caused the termination of their managing agency. The account of these changes may be conveniently taken from the judgment of the learned Chief Justice:

"The circumstances in which the present plaintiffs were appointed to, or assumed, the position of managing agents of the Company are as follows: In 1930 the Company was in financial difficulties and a petition to wind up was presented by a creditor. In order to get out of their difficulties, it was essential for the Company to secure further finance, and the usual practice in this country is for finance to be provided for the joint stock companies by their managing agents. So the Company approached Morarji Goculdas and Co., to see whether they could provide the finance. At that time there were three partners in the firm, Ratansey, Tricumdas and Shantikumar. They were not able to provide the money themselves, but they entered into negotiations with two calcutta firms known as the Jhajharias and Dhandhanias, and eventually it was agreed that these two Calcutta firms should be admitted as partners in the firm of Morarji Goculdas and Co., that they should advance 12 lacs of rupees to the Company, and that they should also be appointed as selling agents of the Company. Those negotiations were completed early in 1931, and on the 19th February, 1931, three documents were executed first, an agreement between the existing partners in Morarji Goculdas and Co. of the one part and these two Calcutta firms of the other part, by which the two Calcutta firms were admitted as partners in Morarji Goculdas and Co. I will refer more particularly to that agreement hereafter. Then there was a second agreement, an hypothecation agreement, between the company and the two Calcutta firms, by which the Calcutta firms agreed to advance 12 lacs of rupees to the Company on certain security, and there was further an agreement between the Company and the firms by which the firms were appointed selling agents. There was no actual agreement between the Company and Morarji Goculdas and Co., appointing the new firm of Morarji Goculdas and Co., as managing agents of the Company."

It should be added that under clause 8 of the first of these agreements, by which the two Calcutta firms were admitted as partners of the appellant firm, it was provided that so long as moneys remained due by the company to the two Calcutta firms, under the hypothecation agreement, the two Calcutta firms should act as managing partners.

It was not long after February 1931, that differences began to arise between the Jhajharias, as represented by their principal partner, Ramdhandas, and the Dhandhanias, as represented by their principal partner, Lokenathprasad, and these differences undoubtedly led to the passing of a resolution by the directors of the company, at a board meeting on the 27th January, 1933, which was in the following terms:

"That the agreement of the employment of Messrs. Morarji Goculdas and Co., as managing agents of the company and the employment of Messrs Morarji Goculdas and Co., be determined."

On the 8th March, 1933, the present suit was filed by the appellants in the High Court of Bombay, in which they claimed as relief, in the first instance, declarations of the invalidity of the resolution of the 27th January, and of the continued subsistence of their managing agency agreement with the company, and asked for relative injunctions; alternatively, they asked for damages for wrongful termination of their said agreement and employment as managing agents of the company. The alternative claim for damages is the only one now insisted on by the appellants.

The termination of the appellants' employment was justified by the respondents on the ground of misconduct and it is clear that the employment of the appellant firm as managing agents not being in dispute, the exact form of the contract of employment or its duration need not be considered, the only issue being whether the appellants were guilty of misconduct sufficient to justify the termination of the contract. In answer to a demand for further particulars, the respondents filed particulars of specific instances of neglect, mismanagement and and misconduct in 13 paragraphs. The specific charges have all failed or been withdrawn, and need not be considered; and the question really rests upon the existence of quarrels between the partners of the appellant firm of such a nature and duration as to seriously impair their capacity to discharge their duty to the company as managing

agents and to prejudicially affect the interests of the company. On this question the learned trial Judge held, on the evidence that the quarrels between the partners were such as to be detrimental to the interests of the company and to justify the termination of employment. On appeal, this finding has been concurred in by the High Court, in its Appellate Jurisdiction. These concurrent findings of fact were challenged before their Lordships on two familiar grounds, namely (1) that there was no sufficient evidence to justify the findings, and (2) that the learned Judges had misdirected themselves in law as to the misconduct necessary to justify the termination of the appellant firm's employment as managing agents of the company.

On the first contention, it is sufficient to state that in the opinion of their Lordships there was ample evidence to justify the findings ; a perusal of the judgment makes this abundantly clear. The admissions of Ramdhandas would have been sufficient by themselves.

On the second contention, the appellants' main contention, as their Lordships understood it, was that the same principle did not apply to agents in the position of the appellant firm as in the case of master and servant, and that the principles applied in *Pearce* v. *Foster*[1], did not apply in this case. In the opinion of their Lordships, this involves a wrong approach to the question. In each case, the question must be whether the misconduct proved, or reasonably apprehended, has such a direct bearing on the employer's business, or on the discharge by the employee of that part of the employer's business in which he is employed, as to seriously affect or to threaten to seriously affect the employer's business, or the employee's efficient discharge of his duty to his employer. The nature of the particular business, and the nature of the duties of the employee, will require to be considered in each case in order to arrive at a just conclusion on the question, but the principle remains the same, and their Lordships are unable to find that the Courts below, in the present case, have failed to apply the correct principle.

Their Lordships accordingly, are of opinion that the present appeal fails and should be dismissed with costs, and they will humbly advise His Majesty to that effect :

Solicitors for Appellant : *Hy. S. L. Polak and Co.*

Solicitors for Respondents : *T. L. Wilson* and *Co.*

V.S. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

B. Mahalakshmamma .. *Petitioner**

*v.*

C. K. Thirunavukkarasu Mudaliar and another .. *Respondents.*

*Limitation Act (IX of 1908), section 12 (2) and (3)—Leave to appeal* in forma pauperis—*Time taken for obtaining copy of the judgment can be excluded.*

Applications for leave to file an appeal in *forma pauperis* come under section 12 (2) of the Limitation Act as also applications for leave to appeal to the Privy Council . As the time taken for obtaining a copy of the judgment can be excluded in computing the period of limitation under section 12 (3) in the case of an application for leave to appeal to the Privy Council, such time can be excluded also in the case of an application for leave to file an appeal in *forma pauperis*. With an application for leave to file an appeal, the appeal memorandum has to be filed, and that could not be prepared without a copy of the judgment.

*Secretary of State for India* In re, (1925) 49 M.L.J. 418 : I.L.R. 48 Mad. 939, applied.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order excusing the delay in filing S. R. No. 20624 of 1943, C. C. C. A. sought to be preferred to the High Court against

1. (1886) 17 Q.B.D. 536.

*C. M. P. No. 3424 of 1943. 25th January, 1944.

the decree dated 17th March, 1943, and passed in O. S. No. 44 of 1942 (pauper) City Civil Court, Madras.

*T. Muniswami Reddi* for Petitioner.

*A. Ramakrishna Aiyar* and *K. Seshagiri Rao Naidu* for Respondents.

The Court made the following

ORDER.—This is a petition to excuse the delay in presenting the appeal against the decree in O. S. No. 44 of 1942 on the file of the Civy Civil Court, Madras. The judgment was pronounced on the 17th March, 1943. The very next day a copy application was made. Stamp and printing charges were called for on the 3rd April, 1943, and the stamp papers were filed on the 5th April, 1943. The printing charges had to be deposited on the 10th April. 11th April, was a Sunday and therefore on the 12th April, a petition had to be filed for extending the time because the office insisted on such a petition. Notice had to go and the petition was finally ordered on the 15th July, 1943. The charges were paid on the same day and copy obtained on the 5th August, 1943. This appeal was filed on the 14th August, 1943.

If the time taken for obtaining copy of judgment is taken into consideration the appeal is in time. It is contended for the respondents that under section 12 (2) of the Indian Limitation Act it is only the time taken for obtaining copy of the decree that could be excluded in the case of applications for leave to appeal, and therefore the time taken for obtaining copy of judgment ought not to be excluded from the calculation. But then, in *Secretary of State for India* In re[1], it was pointed out that the language of section 12 (3) is clear that in the case of an application for leave to appeal to the Privy Council the time taken for obtaining copy of the judgment should be excluded in calculating the period of limitation. Applications for leave to appeal to the Privy Council come under section 12 (2) as also applications for leave to file an appeal *in forma pauperis*. The decision in that case will apply to the facts in this case also, and the time taken for obtaining copy of the judgment will be excluded. If it is not to be excluded I think it is a fit case for exercising the discretion of the Court and excusing the delay. There was a delay of only one day in depositing the printing charges and the party had to file a petition for extension of time, which was contested, and it was only the contest that kept the petition pending till the 15th July. There has been no other laches on the part of the petitioner. With an application for leave to file an appeal the appeal memorandum has to be filed, and that could not be prepared without a copy of the judgment.

In these circumstances, if the appeal is not in time, the delay is excused.

V.S. ——— *Petition allowed.*

## [FULL BENCH.]

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

E. S. Kasim Marakkayar and others .. *Appellants**

*v.*

P. R. M. K. Muhammad Abdul Rahiman Marakkayar .. *Respondent.*

*Registration Act (XVI of 1908), section 17 (2)—Compromise decree operating as lease—Need for registration —Applicability of clause* (b) *of section 17 (2).*

Where a compromise decree operates as a lease it requires registration.

1. (1925) 49 M.L.J. 418 ; I.L.R. 48 Mad, 939.

*A. A. A. O. No. 273 of 1942. 25th January, 1944.

Sub-section (2) of section 17 of the Registration Act only exempts decrees and orders which fall within clauses (*b*) and (*c*) of sub-section (1). The clause which relates to leases is clause (*d*). A lease is of course a non-testamentary instrument which operates to create a right in immovable property but inasmuch as leases are dealt with separately in a later clause, clause (*b*) will not apply to them.

*Hemantakumari Debi* v. *Midnapor Zamindari Co.*, (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.), relied on.

*Natesa Chetty* v. *Vengu Nachiar* (1909) 20 M,L.J. 20 : I.L.R. 33 Mad. 102, overruled.

Appeal against the order of the District Court of Ramnad at Madura dated 21st September, 1942, and passed in A. S. No. 1 of 1942, preferred against the decree of the Court of the Subordinate Judge of Ramnad at Madura passed in E. P. No. 30 of 1940 in O. S. No. 25 of 1929.

*A. C. Sampath Ayyangar* for Appellants.

*T. K. Subramania Pillai* and *M. G. Shanmugham Pillai* for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—The question in this appeal is whether a compromise decree which operates as a lease requires registeration.

In O. S. No. 25 of 1929 of the Court of the Subordinate Judge of Ramnad 21 fishermen sued for a declaration that they were entitled by custom to a right of fishing and to use certain parts of the foreshore at Mantapam for the purposes of drying, curing, storing and selling the fish caught, beaching and storing their fishing canoes and boats, and hauling and drying their fishing nets. They also asked for an injunction restraining the defendant from interfering with these operations. The suit was compromised and on the 17th November, 1930, a decree was passed in the terms agreed upon. There is no doubt that the decree was intended to operate as a lease. The word "lease" was used in the decree itself and the payments which the plaintiffs were to make to the defendant were referred to as "rent". The plaintiffs were to enjoy the rights claimed by them for a period of 21 years, whereupon the full enjoyment of the foreshore was to revert to the defendant. The plaintiffs were to pay in the aggregate Rs. 7,500 per annum, based on a rate of Rs. 250 per boat per year. The names of the boatmen and the numbers of the boats possessed by them respectively were set out in the schedule. Paragraph 4 of the decree stated that at the expiry of the lease, the defendant should take over the huts and buildings at their then value ; but if he did not do this, the plaintiffs should remove them within a period of one month at their own expense. Paragraph 6 stated :

"That in respect of their shares together with interest due by the Sammatties who have committed default in payment of rent as per the terms of the above razinamah and as such lost their leasehold right, the defendant shall realise the same by issue of precept through Court, against their persons and properties immovable and movable."

By virtue of this provision the decree-holder filed E. P. No. 30 of 1940 against the appellants, who were plaintiffs, 2, 4, 10, 11 and 14 respectively in O. S. No. 25 of 1929, to recover the rent payable by them. They raised the objection that the decree could not be enforced as it had not been registered. The Subordinate Judge upheld the contention. In doing so he relied on the decisions in *Sachindra Mohan Ghose* v. *Ramjash Agarwalla*,[1] *Nazar Ali* v. *Indra Kumar Sutar*[2], and *Atul Krishna Bose* v. *Zahad Mondal*[3] On appeal, the District Judge considered that the case was governed by the judgment of this Court in *Natesa Chetty* v. *Vengu Nachiar*[4]. and consequently held that the fact that the decree had not been registered did not render it unenforceable. This appeal is from the decision of the District Judge. It has been placed before a Full Bench as it involves the consideration of the question whether *Natesa Chetty* v. *Vengu Nachiar*[4], must be considered to have been overruled by the Privy Council in *Hemanta Kumari Debi* v. *Midnapore Zamindari Co.*[5].

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1. (1931) I.L.R. 11 Pat. 98.
2. (1928) I.L.R. 56 Cal. 427.
3. (1943) 72 C.L.J. 132.
4. (1909) 20 M.L.J. 20 : I.L.R. 33 Mad. 102.
5. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485(P.C.).

Before discussing the cases referred to, we will examine the relevant portions of section 17 of the Registration Act. Sub-section (1) requires the registration of (*a*) instruments of gift of immovable property; (*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, a right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immovable property; (*c*) non-testamentary instruments which acknowledge the receipt or payment of consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; (*d*) leases of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent; and (*e*) non-testamentary instruments, transferring or assigning a decree or order of a Court or an award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, a right, title, or interest, whether vested or contingent, of the value of one hundred rupees and upwards to or in immovable property. Sub-section (2) (vi) states that nothing in clauses (*b*) and (*c*) of sub-section (1) applies to a decree or order of a Court, except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject matter of the suit or proceeding. Clause (vi) was amended by the Transfer of Property (Amendment) Supplementary Act, 1929. Before the amendment this clause merely provided that nothing in clauses (*b*) and (*c*) of sub-section (1) should apply to "any decree or order of a Court and any award." An award is not now exempt from registration.

In *Natesa Chetti* v. *Vengu Nachiar*[1], a Bench of this Court held that decrees and orders were outside the scope of sub-section (1) of section 3 of the Registration Act of 1877 and it mattered not whether they related to leases. The Court went so far as to hold that pleadings were also outside the sub-section.

The facts in *Hemanta Kumari Debi* v. *Midnapore Zamindari, Co.*[2] were these. In the year 1895, the appellant instituted two suits with the object of recovering possession of plots of land which had been diluviated owing to the encroachment of the river Padma and had then subsequently re-appeared. One suit, No. 72 of 1895, was against the Government. The other suit, No. 73 of 1895, was against the firm of Watson and Co. The parties to suit No. 73 of 1895 entered into a compromise by which the defendants agreed to recognise the plaintiff's ownership of the land and in consideration of that recognition she agreed to give the defendants a permanent lease of the land of which they were in occupation and further agreed that if she succeeded in her suit against the Secretary of State she would grant to them a permanent lease of the land with which that suit was concerned. The suit against the Government succeeded and the respondents, who were transferees of the rights of Watson and Co., sued for specific performance of the agreement for a permanent lease of the land which the Government had held. The defendant contended that the suit was not maintainable by reason of the fact that the compromise decree in suit No. 73 of 1895 had not been registered. In delivering the judgment of the Board, Lord Buckmaster observed, that if the document in question could be regarded as a lease within the meaning of the definition given by the Act, it could not be received in evidence. But it did not operate as an agreement to lease (which is included in the definition of "lease") and therefore it did not require registration. Having expressed the opinion that the decree in that case did not fall within clause (*d*) of sub-section (1), their Lordships went on to hold that it fell within the exemptions from registration granted by sub-section (2) (*vi*).

The High Courts of Calcutta, Patna and Lahore have all held that a decree or order which operates as a lease requires registration and in one case, the Calcutta High Court has expressed the opinion that this question was put beyond doubt by the decision of the Privy Council in *Hemanta Kumari Debi* v. *Midnapore Zamindari Co.*[2]. The Calcutta cases are *Rajani Kanta Banerjee* v. *Raj Kumar Dasi*[3], *Nazar Ali* v. *Indra*

1. (1909) 20 M.L.J. 20 : I.L.R. 33 Mad. 102.
2. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.).
3. (1927) 31 C.W.N. 1099.

*Kumar Satar*[1] and *Atul Krishna Bose* v. *Zahad Mondal*[2]. The first of these cases was a suit between the purchaser and the seller of ryoti land. It was settled by a *solenama* under which the vendor took a permanent tenancy from the vendee and continued in possession. Subsequently the buyer sued to recover possession. He averred that the *solenama* could not be given effect to as it had not been registered. It was held that as the *solenama* created a lease of immovable property it could not be admitted in evidence as it had not been registered. Rankin, C.J., with whom Mitter, J., agreed, said :

> "The first question, therefore, is whether that *solenama* requires registration as being a lease. There can be no doubt that the intention of it was to operate as the grant of a tenancy to take effect at once and in my judgment there is no escape from the conclusion that it was a lease. That being so, there is no escape from the further conclusion that it is not exempt as being an order or a decree of the Court, from the requirement of registration because that requirement is only foregone on the face of section 17 of the Registration Act in cases coming within clauses (*b*) and (*c*) of sub-section (1) of section 17. This was clearly held by the Privy Council in the judgment delivered by Lord Buckmaster in the case of *Hemanta Kumari Debi* v. *Midnapore Zamindari Co.*[3]"

The second Calcutta case had also reference to an unregistered decree based on a *solenama*. The Court pointed out that the decree did not declare any rights, but merely superadded to the contract between the parties the command of a Judge. It did not take the rights of the parties any further than the contract itself.

The Patna cases are *Jagdish Chandra* v. *Biseswar Lal*[4] and *Jagdish Chandra Deo* v. *Biseswar Lal*[5] and the Lahore cases *Attar Chand Kakur and Sons* v. *Chandulal*[6] and *Firm Jhinda Ram Fateh Chand* v. *Mahai*[7].

With respect we agree with the opinion expressed by Rankin, C.J., in *Rajani Kanta Banerjee* v. *Raj Kumari Dasi*[8] that the question is settled by the judgment of the Privy Council in *Hemanta Kumari Debi* v. *Midnapore Zamindari Co.*[3] which means that *Natesa Chetti* v. *Vengu Nachiar*[9] can no longer be followed in such a case as this. But without the aid of the judgment in *Hemanta Kumari Debi's case*[3] we should have felt no difficulty in accepting the argument for the appellants. Sub-section (2) of section 17 of the Registration Act only exempts decrees and orders which fall within clauses (*b*) and (*c*) of sub-section (1). The clause which relates to leases is clause (*d*). A lease is, of course, a non-testamentary instrument which operates to create a right in immovable property ; but inasmuch as leases are dealt with separately in a later clause the rules of construction of statutes preclude the respondent calling in aid clause (*b*).

For these reasons we hold that the appeal is well founded and must be allowed. Whether another remedy is open to the respondent is quite a different question.

As they have succeeded the appellants must be given their costs throughout.

B.V.V. ——— *Appeal allowed.*

## [FULL BENCH.]

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KUNHI RAMAN.

*In the matter of* a Pleader, Vellore.*

*Legal Practitioners' Act (XVIII of 1879), section 13—False statement made by pleader knowingly in the plaint—Punishable with suspension from practice for long period—Filing of a false fee certificate—Punishable also.*

Where a legal practitioner preparing a plaint for a suit on a promissory note introduced a false statement that the instrument had been endorsed to his client for good consideration, while he knew well that no such consideration had passed actually to his client,

1. (1928) I.L.R. 56 Cal. 427.
2. (1943) 72 C.L.J. 132.
3. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.).
4. A.I.R. 1941 Pat. 537.
5. A.I.R. 1942 Pat. 323.
6. (1928) I.L.R. 10 Lah. 685.
7. A.I.R. 1938 Lah. 685.
8. (1927) 31 C.W.N. 1099.
9. (1909) 20 M.L.J. 20 : I.L.R. 33 Mad. 102.

* Referred Case No. 1 of 1944. 31st January, 1944.

*Held*, that it is a very serious matter for a legal practitioner knowingly to make a false statement in a pleading drafted by him and suspension from practice should in the circumstances of the case be for a longer period than one month.

*Held, further*, that the filing of a false fee certificate is also not a light offence and is liable to be punished with suspension.

In re *A Pleader*, (1941) 2 M.L.J. 663 : I.L.R. (1941) Mad. 940 (S.B.), referred to.

The Advocate-General (*Sir A. Krishnaswami Ayyar*) in support of the Notice.

*V. C. Gopalaratnam* and *N. K. Thirumalachari* for the Pleader.

The Judgment of the Court was delivered by

*The Chief Justice.*—The respondent is a pleader practising at Vellore. Five charges of professional misconduct were framed against him; and later three additional charges. These have been investigated by the Subordinate Judge of Vellore with whose report the District Judge has concurred. The Subordinate Judge has found in favour of the respondent on the first five charges and on charge 1 (*b*) of the additional charges. He has found against him on charge 1 (*a*) and charge 2 of the additional charges.

The Subordinate Judge has carefully considered the evidence and we concur in his findings. The correctness of the findings which are against the respondent is not challenged by the learned counsel who appears on his behalf. There can be no doubt on the evidence that these charges have been fully substantiated.

Charge 1 (*a*) has reference to a statement made in a plaint drafted by the respondent and filed in S. C. S. No. 93 of 1936 of the Court of the Subordinate Judge of Vellore. The suit was on a promissory note. The plaintiff was the benamidar of the real owner of the note. It was indorsed to the plaintiff without consideration for the purpose of enabling him to sue upon it. Although the respondent knew that the note had been merely indorsed for collection he inserted in the plaint a statement that the instrument had been indorsed to the plaintiff for good consideration. It is a very serious matter for a legal practitioner knowingly to make a false statement in a pleading drafted by him. The District Judge has suggested that a fitting punishment would be the suspension of the respondent for a period of one month. We consider that his offence is of such a nature that the suspension should be for a longer period. On this charge we direct that he be suspended from practice for a period of three months.

The second charge found against the respondent is in respect of a fee certificate which he had filed in S. C. S. No. 93 of 1936. The certificate stated that he had received from his client Rs. 20. This was untrue. On the respondent's behalf it has been pointed out that this took place in 1937, before the judgment of this Court in In re *A Pleader*[1] was published. This offence is not a light one, but in the circumstances we will inflict the same penalty as was inflicted in that case, namely, suspension for one month. This period will run concurrently with the suspension ordered in respect of charge 1 (*a*).

K.C. ——— *Sanad suspended.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Official Liquidators, The Travancore National and Quilon Bank, Ltd. (in liquidation) .. *Appellant**

*v.*

The Official Assignee of Madras .. *Respondent.*

*Surety—Security bond—Law governing liability under—Security furnished by third party to set aside* ex parte *decree obtained by a bank—Bank obtaining other decrees against same judgment-debtor—Bank going into liquidation—Composition of whole claim with leave of Court—Surety discharged.*

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1. (1941) 2 M.L.J. 663 : I.L.R. (1941) Mad. 940 (S.B.).

* O. S. A. No. 56 of 1943. 26th November, 1943.

In the case of security bonds given to a Court under the Civil Procedure Code, the provisions of the Contract Act with regard to contracts of guarantee do not apply and it is only the general principles which underlie them that have to be applied to determine the nature and extent of the liability of a surety under such bonds.

An *ex parte* decree of the Court of Small Causes obtained by a bank was ordered to be set aside on the furnishing of security for a certain amount. A third party deposited certain shares of the required value and also executed a bond to the Court along with the judgment-debtor for the amount that might be decreed. The claim was ultimately decreed. The bank also obtained other decrees against the same judgment-debtor in the Court of Small Causes and in the City Civil Court. On the bank being compulsorily wound up the judgment-debtor obtained a composition of all the decrees against him from the official liquidator, after obtaining the leave of the Court under section 234 of the Companies Act. Meanwhile the surety who had furnished the security in the Court of Small Causes had become an insolvent and the Official Assignee claimed the shares deposited on the ground that the surety had been discharged by reason of the composition.

*Held*, that it is a fundamental rule of law that a surety is relieved from liability if the creditor compounds or gives time to the principal debtor without his consent. As the surety was not made a party to the application under section 234 of the Companies Act and the order thereon was passed with the consent of the liquidator it amounted to compounding with the debtor and allowing him time to pay a reduced amount and the surety is therefore discharged. The giving of time by the Court of its own accord is different from giving of time by the creditor or by the Court with his consent.

Appeal preferred against the judgment and order of Chandrasekhara Ayyar, J., dated 30th August, 1943 and passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 831 of 1943 in I. P. No. 46 of 1942.

*R. Rajeswara Rao* for *John and Row* for Appellant.

*N. T. Raghunathan* for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—The question in this appeal is whether the liquidators of the Travancore National and Quilon Bank, Ltd., now in liquidation under a compulsory winding up order made by this Court on the 7th September, 1938, are entitled to certain security deposited in the Court of Small Causes, Madras, or whether the Official Assignee as representing the estate of an insolvent named M. Elayaperumal Naicker is entitled to it.

In Small Cause Suit No. 5185 of 1936, the bank sued one Dr. A. R. Krishnaswami Ayyar and another to recover a sum of Rs. 1,728. On the 22nd July, 1936, the suit was decreed *ex parte*. The first defendant then moved the Court to set aside the decree and on the 4th August, 1936, it was set aside on terms. The first defendant was to deposit in Court in cash a sum of Rs. 750 or furnish security for this sum to the satisfaction of the Registrar of the Court. Security was furnished by M. Elayaperumal Naicker, who deposited in Court five shares of the Reserve Bank of India and together with the first defendant executed a bond in favour of the Court. The condition of the bond is stated in these words :

"Now the condition of this bond is such that if the suit is decreed as against the first defendant and if he pays the decreed amount or satisfies the decree debt otherwise as per the terms of the decree to be passed and complies with all orders of Court that might be passed from time to time, then this bond shall become null and void, otherwise it shall remain in full force and virtue."

In March, 1937, the first defendant applied to this Court for an order under section 39 of the Presidency Small Cause Courts Act, 1882, and section 3 of the City Civil Court and Presidency Small Cause Courts (Amendment) Act, 1916, for the transfer of the case to the City Civil Court. The application was granted. After the suit had been transferred to the City Civil Court it was renumbered as No. 353 of 1937. On the 22nd March, 1938, a decree was passed against both the defendants for the payment of the sum of Rs. 1,296 with costs. In O. S. No. 325 of 1936 of the City Civil Court the bank obtained another decree against the first defendant. Here the decretal amount was Rs. 2,486. In Small Cause Suit No. 5186 of 1936 of the Court of Small Causes, Madras, the bank obtained a decree against him for the sum of Rs. 292-12-11. On the 12th August, 1941, Dr. Krishnaswami Ayyar applied to this Court under section 234 of the Indian Companies Act for an order granting leave to the Official Liquidators to compound with him. He suggested that the

Court should accept in respect of these decrees a composition of two annas in the rupee. The Official Liquidators were agreeable to an order being passed, but they suggested that the composition should be on the basis of eight annas in the rupee. On the 24th October, 1941, Mr. Justice Venkataramana Rao granted leave to the Official Liquidators to compound with Dr. Krishnaswami Ayyar who was to pay to them Rs. 2,500 in five monthly instalments of Rs. 500 beginning from the 15th November, 1941. The Official Liquidators compounded with the debtor on these terms but he has made no payment to them.

On the 14th July, 1942, the surety was adjudicated an insolvent and thereupon the Official Assignee applied to the Judge sitting in insolvency (Chandrasekhara Ayyar, J.) for an order directing the Court of Small Causes to deliver to him the five shares in the Reserve Bank. This application was made on the ground that the order of the 24th October, 1941, amounted to a compounding of the debt and the giving of time to the principal debtor, which relieved the surety of his obligation under the bond. The learned Judge accepted this contention. He was of the opinion that if section 135 of the Indian Contract Act did not apply, section 133 would operate to discharge the surety. We are unable to agree with the learned Judge that the provisions of the Contract Act with regard to contracts of guarantee apply here. Section 126 of that Act defines a "contract of guarantee" as,

"a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called 'the principal debtor' and the person to whom the guarantee is given is called the 'creditor'."

As pointed out in *Madanlal* v. *Radhakrishnan*[1], when a security bond is given to the Court under the Civil Procedure Code there is no tripartite agreement between the surety, the principal debtor and the creditor, as in the ordinary contract of guarantee. The surety's contract is with the Court. In *Annadana Jadaya Goundar* v. *Konammal*[2], this Court held that the sections of the Contract Act did not apply, but the principles underlying them did. This opinion is shared by the Bombay High Court, see *Parvatibai* v. *Vinayak Balwant*[3]. We are bound by *Annadana Jayada Goundar* v. *Konammal*[2], with which we respectfully agree, and therefore this appeal has to be decided, not on the provisions of the Contract Act, but on the general principles which underlie its provisions.

It is a fundamental rule of law that a surety is relieved from liability if the creditor compounds or gives time to the principal debtor without his consent. The surety was not made a party to the application made by Dr. Krishnaswami Ayyar under section 234 of the Indian Companies Act and the order which was passed on that application was passed with the consent of the creditor. Clearly it amounted to a compounding with the debtor and allowing him time to pay the reduced amount. Therefore the decision of the learned Judge that the Official Assignee is entitled to the security must be upheld.

We may add that our reference to *Parvatibai* v. *Vinayak Balwant*[3] does not imply that we are in agreement with all that was said there. In one respect, the judgment certainly goes further than we are prepared to go. In that case certain execution proceedings had been adjourned from time to time by orders of the Court pending an appeal. The adjournments extended over a period of six years. The learned Judges considered that this amounted to giving time to the debtor, and the fact that the Court was itself responsible for this made no difference. An order which has the effect of giving time to the debtor may be passed by a Court in spite of strong opposition on the part of the creditor. In such circumstances, is he to lose the benefit of the security? Surely the principles underlying the sections in the Contract Act do not go to this length. The giving of time by the Court is quite a different matter from the giving of time by the creditor. Of course if the creditor

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1. A.I.R. 1935 Nag. 258.
2. (1932) 64 M.L.J. 386: I.L.R. 56 Mad. 625.
3. I.L.R. (1938) Bom. 794.

is a consenting party, as was the creditor in this case, the surety will be relieved of liability unless he also consents.

The Official Assignee is entitled to his costs which will come out of the assets of the bank.

V.S. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Alla Venkataramanna .. *Appellant**

*v.*

Palacherla Mangamma and others .. *Respondents.*

*Contract Act (IX of 1872), section 125 (3)—Suit by minor widow's father as next friend for return of* katnam *and for maintenance against husband's coparceners—Compromise decree and payment to father on his executing indemnity bond—Application by widow on attaining majority for execution of compromise decree ignoring payment made to her father—Compromise—Assignment by coparceners of the indemnity bond executed in their favour to the widow—Conclusiveness of compromise as against indemnifier and the purchaser in court auction of the property charged by the indemnity bond—Absence of notice to indemnifier—Effect—Rights of promisee to relief in respect of indemnity—Limits and nature of.*

*Hindu Law—Joint family—Father charging family property as surety—Obligation not incurred for legal necessity or for benefit of family—Antecedency of obligation, essential to make charge binding on the son's interests.*

*A*, the father of *M*, a minor widow filed a suit as her next friend and guardian against *B* and *C* the surviving coparceners of her husband, for the recovery of Rs. 10,000 alleged to have been paid to the husband as *katnam* at the time of the marriage and claimed to be returnable on the death of the husband. The suit was compromised before trial, with the leave of the Court, on the terms that *B* and *C* should pay to *M* Rs. 4,500 for *katnam* and Rs. 185 per annum for *M's* maintenance during her life, that the former sum should be paid to *A*, the next friend before the registration officer at the time of the registration of the indemnity bond which *A* was to execute on the security of certain immovable properties undertaking to indemnify *B* and *C* against all losses resulting from *M* raising disputes after attaining majority as to the *katnam* and maintenance amounts and that *B* and *C* should in their turn execute a maintenance deed charging the maintenance agreed to be paid on certain immovable properties belonging to their family. A decree was passed in terms of the compromise and after taking out execution proceedings to enforce it the sum of Rs. 4,500 was paid to *A* on his executing an indemnity bond for himself and his minor son charging some immovable properties belonging to their joint family. The maintenance amount was also paid to *A* every year during *M's* minority.

On attaining majority *M* gave notice to *B* and *C* repudiating the compromise entered into by her father but without persisting in that attitude, she filed an execution application against *B* and *C* claiming the sum of Rs. 4,500 for *katnam* and arrears of maintenance for six years, as settled under the compromise decree with interest amounting in all to Rs. 9,566, on the ground that payments made to her father were invalid and not binding on her, as no leave of the Court was obtained as required by Order 32, rule 6 of the Civil Procedure Code for the receipt of such payments by *A* as next friend. Neither *A* who was adjudicated insolvent by this time nor the receiver in insolvency was made a party to the execution proceedings. *B* and *C* raised various objections but ultimately the objections were rejected and execution directed to proceed. Pending an appeal against the order, the Madras Agriculturists' Relief Act had come into force and *B* and *C* claimed benefits thereunder. Ultimately another compromise was arrived at whereby it was provided *inter alia* that *M* should drop all further proceedings in the execution application and refund certain sums drawn by her from the amount deposited in Court by *B* and *C* (after the direction of the lower Court that execution should proceed) and that *B* and *C* should assign to her the indemnity bond executed in their favour by *A* and his son without recourse against themselves in full discharge of her claims. The assignment of the indemnity bond was duly made and *M* then filed a suit to enforce that bond. The lands charged under the bond as well as certain other lands had been mortgaged to *X* by *A* for himself and as father and guardian of his son for discharging an antecedent debt. *X* ultimately obtained a decree on his mortgage and himself purchased the property covered by the indemnity bond for Rs. 1,085 subject to the encumbrance created thereunder. The rest of the hypotheca was purchased by a third party. The suit filed by *M* on the indemnity bond was contested only by *X* the purchaser of the property in Court auction. On a consideration of all the circumstances,

*Held*, that (*i*) the compromise in the execution proceedings by which the indemnity bond was assigned to *M* was not the result of any collusion or fraud ;

(*ii*) the order in the execution application and the compromise based thereon were conclusive against *X* though he was not a party thereto. In the absence of a notice calling upon the indemnifier to satisfy or contest the claim, it would only be open to the indemnifier to impeach the compromise as an imprudent bargain and if such notice had been given, he would be estopped from raising even such an objection. As the compromise in question was entered into *bona fide* and without collusion,

* Appeal No. 302 of 1941. 5th November, 1943.

and was not an improvident transaction it was conclusive against the indemnifier and the purchaser in Court auction of the property charged by the indemnity bond;

Case-law discussed.

(*iii*) Though *M* might have had the benefit of the amounts received by *A* for her maintenance that fact would not preclude her from claiming the full amount settled under the compromise in the execution proceedings (Rs. 12,000) as payable to her by *B* and *C* in respect of which they assigned to her their rights under the indemnity bond;

(*iv*) generally speaking the promisee is entitled not only to recover from the indemnifier what he has been required to pay to the creditor to whose demand or claim the indemnity relates, but he is also entitled, as soon as such creditor makes a demand or obtains judgment and before paying him off, to require the indemnifier to carry out the promise to save him from such demand or judgment by paying the debt either to the creditor or himself. The former relief corresponds to damages for breach of contract by the indemnifier while the latter is in the nature of specific performance of the promise to indemnify. Both reliefs are now generally recognised to be admissible.

Case-law discussed.

*M* as the assignee of the indemnity bond though she was the original creditor, was entitled not *qua* creditor (for her debt was satisfied by the assignment) but as assignee of the indemnity to call upon the indemnifier to discharge the liability of the indemnified, though in effect she was obtaining payment of her own debt. *M* was accordingly entitled to enforce the indemnity charge against the properties in the hands of *X*.

(*v*) The charge created under the indemnity bond does not bind the interest of *A's* son in the properties dealt with therein. Apart from legal necessity or benefit an obligation incurred by a Hindu father as a surety unless it is antecedent to the creation of the charge on the family properties will not bind the son's share therein.

Case-law reviewed and *Bharatpur State* v. *Sri Kishen*, (1935) I.L.R. 58 All. 804, 810 (F.B.), relied on.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada in O. S. No. 54 of 1939 dated 14th February, 1941.

*P. Satyanarayana Rao* for Appellant.

*V. Viyanna* for Respondents.

The Judgment of the Court was delivered by

*Patanjali Sastri, J.*—This appeal arises out of a suit brought by the first respondent for enforcement of an indemnity bond executed by the first defendant for himself and as the father and guardian of the second defendant in favour of defendants 4 and 5 who assigned it to the first respondent. The Additional Subordinate Judge of Cocanada who tried the suit has passed a preliminary decree for payment of Rs. 12,122-5-6 the sum claimed, with subsequent interest and costs, and, in default, for sale of the immovable properties charged under the bond. The third defendant who purchased the rights of defendants 1 and 2 in the properties at an execution sale and was the sole contesting defendant in the Court below has preferred this appeal.

The litigation has a long antecedent history, and attempts at compromise have only served to complicate it by giving rise to fresh technical pleas. Plaintiff's husband who was the undivided younger brother of defendants 4 and 5 died in 1925 when she was yet a girl of ten years, and her father, the first defendant herein, acting as her next friend instituted a suit against defendants 4 and 5 (O. S. No. 12 of 1928 in the Court of the Subordinate Judge at Rajahmundry) for recovery of a sum of Rs. 10,000 alleged to have been paid to the plaintiff's husband as *katnam* at the time of her marriage and claimed to be returnable on the death of the husband. Before the suit proceeded to trial it was compromised with the leave of the Court on the terms that the defendants 4 and 5 should pay to the plaintiff Rs. 4,500 for *katnam* and Rs. 185 per annum for her maintenance during her life, that the former sum should be paid to the first defendant, her next friend in that suit, before the registration officer at the time of the registration of an indemnity bond which the first defendant was to execute on the security of certain immovable properties undertaking to indemnify defendants 4 and 5 against all losses resulting from the plaintiff raising disputes after attaining majority as to the *katnam* and maintenance amounts, and that the defendants 4 and 5 should in their turn execute a maintenance

deed charging the maintenance agreed to be paid on certain immovable properties belonging to their family. It is to be noted that though the claim in that suit related solely to the *katnam*, the compromise provided also for payment of a maintenance allowance to the plaintiff. The Court therefore directed that a decree should be passed in accordance with the compromise "so far as it relates to suit," as required by Order 23, rule 3, Civil Procedure Code. This distinction, however, does not appear to have been kept in view in drawing the compromise decree, for, it provided, *inter alia*, "that the defendants do pay Rs. 185 to the plaintiff on the 13th day of August, 1928, as and for her maintenance and do thereafter pay to the minor plaintiff maintenance at Rs. 185 on the 13th August of each year throughout her lifetime, etc." In pursuance of this decree, which was passed on 14th August, 1928, the defendants 4 and 5 executed a maintenance deed on 15th September, 1928, but the payment of Rs. 4,500 was delayed as there was apparently some difference between the parties as to the sum for which the indemnity bond was to be given. The first defendant therefore proceeded to execute the decree for Rs. 4,500 by filing execution petition (No. 65 of 1928) as the plaintiff's next friend on 20th November, 1928. This resulted in the payment of Rs. 4,500 by defendants 4 and 5 to the first defendant and the execution by the latter of the indemnity bond (Ex. A) dated 17th January, 1929, on which the present suit is based. The sum of Rs. 4,500 having thus been paid, the execution petition was allowed to be dismissed as "settled." The maintenance allowance payable to the plaintiff under the compromise was also paid by defendants 4 and 5 to the first defendant on her behalf every year during her minority.

The attainment of majority by the plaintiff on 23rd December, 1933, opens another chapter of the story. She gave notice to defendants 4 and 5 on 25th September, 1934, repudiating the compromise entered into by her father the first defendant. She did not, however, persist in this attitude, for she filed, on 10th April, 1935, an execution application (No. 333 of 1935) against defendants 4 and 5, claiming the sum of Rs. 4,500 for *katnam* and arrears of maintenance for six years, as settled under the compromise decree, with interest as stipulated therein, amounting in all to Rs. 9,566, on the ground that payments made to her father were invalid and not binding on her, as no leave of the Court was obtained as required by Order 32, rule 6, Civil Procedure Code, for the receipt of such payments by the first defendant as the plaintiff's next friend. Neither the first defendant who was adjudicated insolvent in December, 1934, nor the receiver in insolvency was made a party to the execution proceeding aforesaid. The defendants 4 and 5 raised various objections to their being made to pay to the plaintiff over again amounts which they had already paid to her father on her behalf during her minority, alleging that the proceeding instituted by the plaintiff was the result of fraud and collusion, by which it was apparently meant that the plaintiff had already received the benefit of the payments made to her father. The Court, however, without going into the question of the alleged fraud, felt constrained by what it thought was the effect of certain provisions of the Code, as interpreted by the decisions of this Court, to hold that the defendants 4 and 5 were liable to pay the sum claimed, observing "No doubt, it is a hardship to them to pay the amount over again but it cannot be helped." It accordingly passed, on 24th February, 1936, an order directing execution to proceed and transmitting the decree to another Court for that purpose. The defendants 4 and 5 thereupon preferred an appeal against the said order to this Court (A. A. O. No. 206 of 1936) repeating all the objections to the execution of the decree which they had unsuccessfully urged in the lower Court. They also deposited in Court the amount claimed by the plaintiff and got the further proceedings in execution stayed till the disposal of the appeal. While the appeal was pending, the Madras Agriculturists' Relief Act was passed in March, 1938, providing for the scaling down of the debts due by "agriculturists" as defined in the Act, and the defendants 4 and 5, claiming to be agriculturists entitled to the benefits of the Act, applied to the lower Court for scaling down the amount payable under the compromise decree which the plaintiff was seeking to execute as aforesaid. At this stage there was another compromise

whereby it was provided *inter alia* that the plaintiff should drop all further proceedings in the execution application (No. 333 of 1935) and refund the sum of Rs. 2,000 which she had drawn from the amount deposited in Court by defendants 4 and 5, the balance of the deposit being withdrawn by them, that on such refund being made by the plaintiff, the defendants 4 and 5 should assign to her the indemnity bond executed in their favour by defendants 1 and 2, without recourse against themselves, and withdraw their appeal as well as their application for relief under the Madras Agriculturists' Relief Act. Both parties filed a petition in this Court (C. M. P. No. 3766 of 1938) setting out the terms of the compromise and praying that a decree be passed in accordance with such terms. This petition and the appeal already filed came on for hearing on 16th September, 1938, and the Court recorded the compromise and adjourned the proceedings for final orders to be made after each party carried out its part of the agreement. The plaintiff accordingly paid back the sum of Rs. 2,000 to the defendants 4 and 5 who in their turn executed and completed an assignment deed (Ex. E) dated 21st October, 1938, in favour of the plaintiff, transferring all their rights under the indemnity bond (Ex. A) given by defendants 1 and 2. Final orders were made pursuant to this compromise arrangement on 5th December, 1938.

It will now be convenient to refer to the transactions which bring the third defendant on the scene. The lands charged under the indemnity bond as well as certain other lands were mortgaged by the first defendant, acting for himself and as the father and guardian of the second defendant, to the third defendant on 30th March, 1932, for a sum of Rs. 6,000 borrowed from the latter for discharging an antecedent debt due from the first defendant to one Padmaraju under a promissory note. On 8th March, 1934, the third defendant issued through his lawyer a notice to the defendants 1 and 2 charging them with fraudulent misrepresentation and suppression of the earlier encumbrance under the indemnity bond and calling upon them to secure the cancellation of that bond by carrying out their undertaking therein, that is to say, by causing the plaintiff who had attained majority to execute a ratification deed in favour of defendants 4 and 5 affirming and ratifying the compromise decree in O. S. No. 12 of 1928 and the payments received in pursuance thereof. As the first defendant, however failed to do so, the third defendant brought a suit (No. 39 of 1934) in the lower Court against defendants 1 and 2 and another to enforce his mortgage. The defendants 4 and 5 were not made parties to this suit. A preliminary decree for sale for Rs. 8,000 and odd was passed on 2nd October, 1934, and a final decree followed on 18th January, 1935. In execution of this decree the hypotheca was brought to sale on 26th February, 1936, and the third defendant himself purchased the properties covered by the indemnity bond for Rs. 1,085 subject to the encumbrance created thereunder and the rest of the hypotheca was sold to a third party for Rs. 4,950. It would appear that no further sum was recovered towards the balance of the decree amount as the first defendant was adjudicated insolvent in December, 1934. The properties charged under the indemnity bond having thus become vested in the third defendant, he alone contested the plaintiff's claim in the Court below and has brought this appeal.

Numerous contentions have been raised by Mr. Satyanarayana Rao for the appellant but many of these points do not call for consideration in the view we are inclined to take on the main questions as to the true meaning and effect of the compromise entered into between the plaintiff and defendants 4 and 5 in the execution proceeding, E. A. No. 333 of 1935, and its binding character with reference to the appellant. The compromise was attacked as fraudulent and brought about by the first defendant and the plaintiff colluding with defendants 4 and 5 so as to cause loss to the appellant, as he has purchased the properties covered by the indemnity bond. While there may be some room for suspicion that the E. A. No. 333 of 1935 as well as the present suit were inspired by the first defendant, there is no basis for the suggestion that the defendants 4 and 5 entered into the compromise with any fraudulent or improper motive. They had, as stated already, vigorously contested the plaintiff's claim to execute the compromise decree against them by

raising all available pleas, and had also preferred an appeal to this Court (A. A. O. No. 206 of 1936) from the adverse order of the lower Court. It was at that stage that the compromise was effected, and there is nothing to suggest that, in withdrawing the appeal and the application for relief under the Madras Agriculturists' Relief Act in consideration of the plaintiff accepting an assignment of the indemnity bond in satisfaction of her claim, the defendants 4 and 5 were influenced by any consideration other than a desire to protect themselves from a claim which one Court had upheld as well founded. From the plaintiff's standpoint, apart from the questions of law involved in the appeal which were by no means free from doubt, the fact that defendants 4 and 5 were agriculturists and were entitled to the benefits of the Madras Agriculturists' Relief Act gave them considerable bargaining power, and it may well be that in accepting the assignment of the indemnity bond she was influenced by the consideration that the property charged under the bond having passed to the appellant who was not an agriculturist within the meaning of the Act, her claim based on the bond would be immune from any liability to be scaled down under the Act. It would thus appear that the compromise suited the interests of both parties, and we are unable to agree with the appellant's suggestion that it was the result of a collusive scheme to defraud him.

The question then arises whether the order in the execution application (E. A. No. 333 of 1935) and the compromise based thereon are conclusive against the appellant who was not a party thereto. It is settled law that a judgment obtained after *bona fide* contest against the party indemnified in respect of the matter to which a contract of indemnity applies is conclusive against the indemnifier, although the latter was no party to it, not because such judgment binds him as *res judicata*, but because the claim against which indemnification has been promised has been conclusively established against the party indemnified. This is the principle on which section 125 (1) of the Indian Contract Act is based. It was, however, urged that a compromise stood on a different footing, and that, unless notice had been given to the indemnifier calling upon him to satisfy or contest the claim and he failed or refused to do so, he was not precluded from showing, in a suit to enforce the indemnity, that the claim was unsustainable. Neither the observations of Mellish, L.J., in *Parker* v. *Lewis*[1] nor of Tenterden, C.J., in *Smith* v. *Compton*[2] quoted in *Durga Kunwar* v. *Kalicharan*,[3] which were relied on by the learned counsel for the appellant, lend any support to the proposition in the broad terms contended for by him. All that the decisions establish is that, in the absence of such notice, it would be open to the indemnifier to impeach the compromise as an imprudent bargain and that if such notice had been given, he would be estopped from raising even such an objection. But the compromise will be treated as conclusive against the indemnifier subject only to its being attacked as an improvident transaction, provided, of course, the compromise has been entered into *bona fide* and without collusion. This is also clear from section 125 (3) of the Indian Contract Act. In the present case it would not be suggested that it was imprudent for the defendants 4 and 5 to have entered into the compromise in question. As already stated, one Court had upheld the plaintiff's claim overruling all their objections, and though they had preferred an appeal the questions involved were not altogether free from doubt and difficulty. And the failure of their application for relief under the Madras Agriculturists' Relief Act was by no means problematical in view of the exemptions referred to in section 4, clauses (*f*) and (*g*) of the Act. In such circumstances, there is hardly any room for attack on the compromise as an imprudent bargain. Indeed, the learned counsel for the appellant made no such attempt before us. His attempt rather was to show that the points raised by the defendants 4 and 5 and decided against them in the execution proceeding (E. A. No. 333 of 1935) were wrongly decided and that the plaintiff's claim therein was really unsustainable, that is to say, to reopen the appeal A. A. O. No. 206 of 1936 which was concluded by the compromise and argue it before us. This, we are clearly of

1. (1873) L.R. 8 Ch. Ap. 1035 at 1059.
2. (1832) 3 B. & A. 407 : 110 E.R. 146.
3. (1913) I.L.R. 35 All. 168 at 171.

opinion, the appellant is not entitled to do, and we hold, accordingly that the compromise entered into between the plaintiff on the one hand and defendants 4 and 5 on the other is conclusive against the appellant, and that he is not entitled to question the liability thereby established against the said defendants. We may also add in this connection that the issue of a notice to the first defendant would have been an empty formality, as the circumstances of the case irresistibly lead to the inference that he knew all about the plaintiff's claim against defendants 4 and 5 in the execution proceeding, if, indeed, he did not actually instigate it as alleged by them. No question of notice to the appellant could arise as he was only a purchaser of the property from the first defendant subject to the charge for indemnity.

It was next contended that the plaintiff was not entitled to recover the sum now claimed without proving that her father, the first defendant, did not pay to her, or utilise for her benefit, the amounts received from defendants 4 and 5 under the compromise decree in O. S. No. 12 of 1928. This question was not gone into by the executing Court in E. A. No. 333 of 1925, as it took the view that the payments to the first defendant did not operate as a valid discharge of the decree debt owing to non-compliance with the provisions of Order 32, rule 6, Civil Procedure Code. As regards the sum of Rs. 4,500 received by the first defendant as *katnam* payable to the plaintiff, it was now sought to establish that the first defendant invested Rs. 3,000 out of it in a mortgage, and that the balance was utilised for purchasing the house which originally belonged to the defendants 1 and 2 and was sold by the Official Receiver in the insolvency of the first defendant, as well as some jewels for the plaintiffs. We consider it unnecessary to review the evidence on this point as the learned Subordinate Judge has discussed it in detail and we entirely agree with his appreciation of the evidence and his conclusion that no portion of the sum of Rs. 4,500 was utilised for the benefit of the plaintiff. As regards, however, the annual payments of Rs. 185 for the maintenance of the plaintiff during her minority we are unable to share the learned Subordinate Judge's view. It was not disputed that the plaintiff was all along living with her father and was maintained by him. But the learned Judge observed that it was only natural that a father should feed his daughter and that it was repugnant to Hindu sentiment to suppose that he should charge the plaintiff for food "as if the first defendant's house is a hotel." This reasoning does not commend itself to us. It is one thing to say that a father would not think of charging his widowed daughter for her maintenance if she had no other means of maintaining herself, but it is a different thing to suppose that he would not utilise for her maintenance sums expressly paid to him periodically by persons who were bound in law to maintain her for the very purpose of her maintenance. The first defendant himself did not go into the box and say that he did not so utilise the sums received by him, though it is fairly clear that he was supporting her in this litigation. We are therefore,, of opinion that so far as these sums are concerned they must be deemed to have been utilised by the first defendant for the benefit of the plaintiff. Whether any portion of the plaintiff's claim in the present suit should fail on this account is another matter.

This brings us to the consideration of the true basis of the plaintiff's claim as laid in her plaint. Appellant's learned counsel drew attention to paragraphs 6 and 11 as showing that the claim was based entirely on the plaintiff's right to recover from the defendants 1 and 2 the *katnam* and the maintenance amounts paid to the first defendant on her behalf during her minority on the footing that the first defendant failed to pay over those sums to her or utilise them for her benefit; while learned counsel for the respondent-plaintiff Mr. Rajah Ayyar, suggested that, on a proper construction of the plaint read with the reply statement filed on 15th March, 1940, the suit must be regarded as one brought by the plaintiff as an assignee to enforce the indemnity given to defendants 4 and 5 for the amount of loss as determined in the execution proceedings (E. A. No. 333 of 1935) and the compromise which followed. The plaint is by no means conspicuous for its clarity and it must be admitted that paragraph 6, and, in particular, paragraph 11 do lend support to the appellant's view. But paragraph 7, read with paragraph 4 of the reply

statement which insists on the conclusiveness of the compromise in E. A. No. 333 of 1935, would seem to indicate that the claim was based on the assignment to the plaintiff of the right of defendants 4 and 5 to recover, on foot of the security bond (Ex. A), the sum agreed upon, (namely, Rs. 12,000) as their liability to the plaintiff under the compromise read with the assignment deed which forms part of the same transaction. It was perhaps intended to base the plaintiff's right to relief alternatively on both the grounds, though this is not clearly stated. The fact that the amount payable on the one or the other basis is very nearly the same has served to minimise the importance of clarity on the point. We consider, therefore, that the plaintiff should be allowed such relief as she may be found entitled to on the facts of the case without being pinned to any particular allegations in the plaint. In this view, our finding that the plaintiff must be taken to have had the benefit of the amounts received by the first defendant for her maintenance would not preclude her from claiming the full amount settled under the compromise as payable to her by defendants 4 and 5 in respect of which they assigned to her their rights under the indemnity bond, provided of course, they were entitled under the terms of the bond to recover such sum from their indemnifiers, the defendants 1 and 2, and from the properties charged under the bond, in the events that had happened.

It will be convenient here to refer to the material terms and covenants of the indemnity bond (Ex. A). After reciting the compromise of the suit O. S. No. 12 of 1928, the execution of the maintenance deed and the payment of Rs. 4,500 by the defendants 4 and 5 and describing the properties given as security, "in order that no disputes whatever might be raised by the minor plaintiff in respect of the said compromise or in respect of the said amount or in respect of the said maintenance" it provides as follows :

"If in respect of the said amount or of an amount in excess thereof, or in respect of the said maintenance of the plaintiff, the minor-plaintiff, Palacherla Mangamma, raises any disputes, whatever, at any time, against you or your representatives, all the losses that may be sustained by you in that behalf, that is, the sum of Rs. 10,633 and, if the plaintiff claims maintenance in excess of the aforesaid maintenance, the sum of Rs. 2,000 being the loss that may be sustained by you in that behalf, in all, Twelve thousand six hundred and thirty three rupees, you may recover from the aforesaid security properties, from our other movable and immovable properties, from us and from our representatives

* * * * *

It has been settled that when a document on proper stamp paper is caused to be executed, at our expense, by the plaintiff, after the minor-plaintiff ceases to be a minor, stating that she has agreed according to the compromise petition filed after effecting a compromise, on 14th August, 1928, in respect of O. S. No. 12 of 1928 on the file of the Court of the Principal Subordinate Judge, Rajahmundry, and the same got registered and delivered to you, this security bond shall become cancelled."

The appellant contends that, on the true construction of this document, it only contemplates and provides for losses arising from the repudiation by the plaintiff, after attaining majority, of the compromise entered into by the first defendant as her next friend and her claiming amounts for *katnam* or maintenance in excess of the sums agreed upon, but the plaintiff having affirmed and ratified such compromise in her execution application by claiming against the defendants 4 and 5 only the sums settled as payable thereunder and no more, no liability could arise under the bond merely because the first defendant did not pay over the amounts received by him to the plaintiff or use them for the plaintiff's benefit as alleged by her. We cannot agree. The words of the covenant quoted above are very wide and are apt to cover a claim by the plaintiff grounded on the misappropriation or dishonest withholding of the moneys received by the first defendant on her account under the compromise decree.

It was said that, even so, the bond provided for indemnity only against the "losses that may be sustained by you," and that, inasmuch as the defendants 4 and 5 did not have to pay anything to the plaintiff under the later compromise in E. A. No. 333 of 1935 but merely assigned to her their right to indemnity under Ex. A in satisfaction of her claim, they did not actually sustain any "loss" and were not entitled to any payment under the bond whose assignment was therefore of no avail to the plaintiff.

A number of cases have been cited before us, but it is unnecessary to refer to many of them as we think that the position as regards the rights of a promisee in a contract of indemnity is fairly well settled. It is, of course, material in such cases to consider the terms of the particular contract but, subject to such variations as might arise from any special terms, the position generally speaking seems to be this: the promisee is entitled not only to recover from the indemnifier what he has been required to pay to the creditor to whose demand or claim the indemnity relates, but he is also entitled, as soon as such creditor makes a demand or obtains judgment and before paying him off, that is to say, as soon as loss is imminent and before it is actually sustained, to require the indemnifier to carry out the promise to save him from such demand or judgment by paying the debt either to the creditor or to himself. The former relief corresponds to damages for breach of contract by the indemnifier, while the latter is in the nature of specific performance of the promise to indemnify. Both reliefs are now generally recognised to be admissible. In Lindley's work on Partnership it is laid down,

> " Where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been damnified ; and the limit of the defendant's liability to the plaintiff is the full amount for which he is liable."

This statement of the law was adopted in *Wolmarshausen* v. *Gullick*[1], and has since been followed in numerous cases. At one time there was some difference of opinion as to whether, before actual payment by himself to the creditor, the party to be indemnified was entitled to have the amount of his liability paid over to himself. Jessel, M.R., in *Lacey* v. *Hill*[2] was inclined to think that he was, where the creditor was not a party to the action. This view was questioned in In re, *Richardson Ex parte the Governors of St. Thomas's Hospital*[3], (*Per* Fletcher Moulton, L.J.). More recent decisions, however, recognise such a right in the promisee. Buckley, L.J., observed in In re, *Law Guarantee Trust and Accident Society*[4]:

> " The equitable doctrine is that the party to be indemnified can call upon the party bound to indemnify him specifically to perform his obligation and to pay him the full amount which the creditor is entitled to receive and that whether, having received it, he applies it in payment of that creditor or not, is a matter with which the party giving the indemnity is not concerned."

See also In re, *Harrington Motor Co., Ltd., Ex parte Chaplin*[5], and *Hood's Trustee* v. *Southern Union General Insurance Co., of Australasia, Ltd.*[6]. This form of relief, however, is not allowable in cases where the indemnifier is himself under an obligation to pay the creditor, for then, the party seeking indemnity would not be in a position to give a discharge to the indemnifier unless he has himself paid the creditor. See *Wolmershausen* v. *Gullick*[7], Compare the observations of the Privy Council in *Veerappa Chetty* v. *Arunachalam Chetti*[8], Reference may also be made to two decisions which not only afford striking illustrations of the principles above mentioned, but are particularly apposite here: In re *Parkins Poyser* v. *Beyfus*[9], and *British Union and National Insurance Co.* v. *Rawson*[10] In both of them, the person indemnified being unable to pay the creditor, assigned his right of indemnity in satisfaction of the claim, and it was held that the creditor was entitled to recover from the indemnifier the full amount for which the indemnifier was liable though the latter had paid nothing in respect of that liability. It will be seen that in those cases, as in the present case, the assignee of the indemnity was the original creditor and he released the indemnified in consideration of the assignment of the indemnity, so that the latter had, in the result, suffered no loss". Nevertheless, the original creditor was held entitled, not *qua* creditor, for, his debt was satisfied by the assignment, but as assignee of the

1. (1893) 2 Ch. 514.
2. (1870) L.R. 18 Eq. 182.
3. (1911) 2 K.B. 705, 713.
4. (1914) 2 Ch. 617 at 633.
5. (1928) Ch. D. 105.
6. (1928) Ch. D. 793.
7. (1893) 2 Ch. 514 at 529.
8. (1926) I.L.R. 4 Rang. 48 at 53 and 54 (P.C.).
9. (1898) 2 Ch. 182.
10. (1916) 2 Ch. 476.

indemnity, to call upon the indemnifier to discharge the liability of the indemnified, though, in effect, he was obtaining payment of his debt. It was observed that,

"The measure of the liability of the indemnifier is not the capacity of the indemnified to pay but his liability to pay. To adopt the words of Sir George Jessel, M.R., in *Lacey* v. *Hill*[1], the indemnifier is certainly liable in equity to indemnify and liable to indemnify to the extent of the liability incurred by the indemnified." (Per Warrington, L.J., in *British Union and Insurance Co.* v. *Rawson*[2]).

Applying these principles to the facts of the present case, it will be seen that the first defendant, while under an obligation to indemnify the defendants 4 and 5 against the claim of the plaintiff from whom he undertook to get a release of her claim, was also liable to pay over the moneys received from defendants 4 and 5 under the compromise decree to the plaintiff. These defendants could not therefore have called upon him to pay the amount of their liability, as settled under the later compromise with the plaintiff, to themselves. But they had the right to call upon him to discharge their liability to the plaintiff which must, for the reasons already indicated, be taken to have been conclusively established against the first defendant also at Rs. 12,000. It is this right which the defendants 4 and 5 assigned to the plaintiff in satisfaction of her claim under the compromise decree and which the plaintiff seeks to enforce in this suit. As the first defendant could not resist the demand of defendants 4 and 5 by showing that the amounts received from the latter had been paid over to the plaintiff or otherwise duly accounted for, for that would be challenging the conclusiveness of the compromise in the execution proceeding (E. A. No. 333 of 1935), the plea would be equally unavailable against the plaintiff suing as the assignee of those defendants; and the appellant who, as already stated, has purchased the properties at Court auction in execution of his mortgage decree can be in no better position. The Court below has found that the appellant was not a *bona fide* transferee for value without notice, as he was aware of the charge created under the indemnity bond from the beginning, having been an identifying witness at the registration of the bond. It has found, too, that, having regard to the value of the properties in question and the disproportionately low price for which he purchased them in Court auction, he must be taken to have purchased them subject to the indemnity charge. These findings have not been challenged before us and must be accepted as correct, as indeed they seem to be amply supported by the evidence in the case. It follows that the plaintiff will be entitled to enforce the indemnity charge against the properties in the hands of the appellant.

There remains only the question whether the charge created under the indemnity bond binds the second defendant's interest in the properties which are joint family properties. The learned Subordinate Judge was inclined to think that it was binding on the second defendant and that, in any case, the second defendant not having challenged its binding character after attaining his majority in 1935, it was not open to the appellant to raise the question. The learned Judge held that the charge was binding on the second defendant's share in the properties because the sum of Rs. 4,500 received by the first defendant from the defendants 4 and 5 was utilised for the benefit of the family and the second defendant must be deemed to have also been benefited thereby. There is no very clear evidence as to how the first defendant utilised the money after he received it from the defendants 4 and 5, but assuming that it was subsequently utilised for the benefit of the joint family of himself and his son the second defendant, this can have no bearing on the issue, as the binding character of the transaction must be tested with reference to its object and purpose. Was it entered into for family necessity or benefit? The answer must be in the negative, as the first defendant effected the charge on the family properties not for any purpose connected with the family at all, but with a view to enable him, as the guardian of the plaintiff, to receive the moneys payable to her under the compromise decree in O. S. No. 12 of 1928. He was accountable to the plaintiff for the moneys thus received, and any subsequent application of

1. (1870) L.R. 18 Eq. 182, 191. 2. (1916) 2 Ch. 476 at 487.

the moneys for family purposes in breach of his fiduciary obligation cannot validate the alienation of family property effected for the purpose of facilitating the receipt of such moneys on the plaintiff's account.

It was, however, urged by the plaintiff's learned counsel that apart from any family necessity or benefit, it was competent for the first defendant as a Hindu father to charge family property, so as to bind his son, to secure an obligation incurred by him as a surety, though such obligation was *not* antecedent to the creation of the charge. It was said that suretyship debts of the father formed a special class of debts which need not be antecedent in order to support the father's alienation of family property for discharging them. No texts of Hindu Law attaching any special sanctity to such debts were brought to our notice. Indeed, such discussion regarding them as one finds in the books would rather seem to show that it was not without some doubt that they were recognised as debts to which the pious obligation of the son would at all extend. Our attention was called, however, to two decisions, *Chettikulam Venkatachalam Reddi* v. *Chettikulam Kumara Venkatachala Reddi*[1] and *The Maharajah of Benares* v. *Ramkumar Misir*[2], as supporting the proposition contended for. The latter case was overruled by a Full Bench in *Bharatpur State* v. *Sri Kishen Das*[3], as being inconsistent with the principles elucidated by the Privy Council in *Brij Narain* v. *Mangal Prasad*[4], In the former case, the discussion related only to the liability of the son's share in the family property for the discharge of such obligation. It is only from the decretal portion of the judgment and the statement of facts in the report that one is able to gather that the father in that case had effected a mortgage to secure his obligation as a surety incurred only at the time of such mortgage, and that the mortgage as such was upheld even in respect of the son's share in the property. The case is not referred to as a decision on this point in any of the leading text-books on Hindu Law to which our attention was drawn, and the assumption underlying the concluding part of the judgment cannot, in our opinion, be regarded as authority in support of the proposition now contended for. Sulaiman, C.J., observed in *Bharatpur State* v. *Sri Kishen Das*[3]:

> "Now the validity of an alienation in discharge of an antecedent debt has been characterised by their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh*[5], as an exception to the general rule of want of authority in the father to transfer property without legal necessity or when there is no benefit to the estate, and their Lordships have observed that the exception should not be extended. I would, therefore, hesitate to apply the exception to the case of a suretyship where no antecedency in point of time exists."

We respectfully agree with this observation.

The other branch of the contention is that it is not open to the appellant to question the validity of the indemnity charge as affecting the second defendant's share as the latter did not himself impugn it after attaining majority. It was urged by Mr. Rajah Aiyar that an unauthorised alienation of family property by the manager was only voidable at the instance of junior members of the family so far as it related to their interests in the property, and until it was avoided by them by some act of repudiation it was valid and operative and could not be challenged by any other person. It is necessary to bear in mind in this connection that the mortgage, Ex. V was granted to the appellant for discharging antecedent debts of the first defendant and was therefore binding on the second defendant's interest in the hypotheca. As already stated, the appellant obtained a decree on the mortgage and in execution of the decree purchased the property in 1936. The second defendant's interest in the property mortgaged thus validly passed to the appellant in that year, and it was not suggested that the second defendant, who attained majority only in the previous year, did anything by way of affirming or ratifying the prior charge under the indemnity bond before he lost his interest in the property by the execution sale. Obviously, the only person interested in

1. (1905) I.L.R. 28 Mad. 377.
2. (1904) I.L.R. 26 All. 611.
3. (1935) I.L.R. 58 All. 804, 810 (F.B.).
4. (1923) 46 M.L.J. 23 : L.R. 51 I.A. 129 : I.L.R. 46 All. 95 (P.C.).
5. (1917) 39 All. 437, 444.

impeaching the validity of the earlier encumbrance on the property after such sale was the appellant, and it would indeed be odd if he were to be denied the right to do so. It was said that the right of avoiding an alienation by the manager of a joint family is a right restricted to the coparceners and cannot pass at an involuntary sale, though a voluntary sale by the person having such right might itself be regarded as a sufficient repudiation of the unauthorised alienation so as to entitle the alienee thereafter to question it. No authority, however, was cited in support of this proposition. On the other hand direct authority against it is to be found in *Madan Lal* v. *Gajendrapal Singh*[1]. We agree with this decision and hold that the appellant is entitled to set up the invalidity of the charge created under the indemnity bond so far as the second defendant's interest in the property is concerned.

In the result, the appeal fails except with reference to the second defendant's half share in the properties covered by the indemnity bond, Exhibit A. The decree of the Court below will be modified by the exoneration of the said share. Time for payment extended till 4th January, 1944. In other respects, the decree will stand. Each party will bear the costs of this appeal.

K.S. ——— *Appeal dismissed except as regards second defendant's share.*

## [PRIVY COUNCIL.]

[On appeal from the High Court of Judicature at Calcutta.]

PRESENT:—LORD ATKIN, LORD PORTER AND SIR GEORGE RANKIN.

Sarala Sundari Dassya .. *Appellant* *

*v.*

Dinabandhu Roy Brajaraf Saha (Firm) .. *Respondents.*

*Succession Act (XXXIX of 1925), section 263*—Locus standi *to apply for revocation of probate—Test—Probate obtained of will produced for the first time, six years after testator's death—Debts incurred by heirs in the meanwhile—Creditor can apply to revoke probate on the ground that it was obtained fraudulently.*

*Privy Council practice—Parties bound to produce the original document or a photostatic copy of it when its genuineness is impugned.*

For six years after the death of a person his sons and widow dealt with his property precisely as they would have dealt with it if there had been an intestacy. The widow thereafter applied for and obtained probate of a will alleged to have been executed by her husband and which she produced for the first time then. The sons had during the period following their father's death incurred a debt for a business started and conducted by them. The creditors who had obtained a decree in respect of that debt suspecting that the alleged will was a forged document, applied for the revocation of the probate. On a contention that such a person had no *locus standi* to make such an application,

*Held*, that it is putting it on much too narrow a footing to say that it is only those persons who could be cited before the grant of probate who are the persons who could apply to revoke the probate. One of the grounds for revoking a probate is that the grant was obtained fraudulently by making a false suggestion, which would cover the case of putting forward a forged will. When a person applies for revocation on such a ground and complains that he has been defrauded, he is one of the persons who is injured by the fraud alleged and as such is entitled to apply to revoke the probate and thereby cause the fraud to become inoperative. Hence the creditors of the heirs of the testator who say that they are being, or are likely to be defeated in their rights against the heirs by reason of the property which otherwise appeared to be in the possession of the heirs being withdrawn by the will, have a proper *locus standi* to come into Court and ask that the probate should be revoked.

*Held further*, that when their Lordships have to deal with the question of whether or not a document is forged, it is obviously of first importance that they should have the document before them. It should be considered to be a rule of practice in all cases where the genuineness of a document is in issue, that the parties concerned should bring before their Lordships, either the original document or, at any rate, a photostatic copy of it, so that their Lordships should be in the same position as the Courts in India or elsewhere, of having the documents before them and being able to form their own impression upon an inspection. It is so important that, as a general rule, it is probable their Lordships would find it necessary to adjourn any case for the production of such a document if it were not forthcoming.

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1. (1929) I.L.R. 51 All. 575.

* P.C. Appeal No. 6 of 1942. 2nd November, 1943.

*Sir T. Strangman and U. Sen Gupta* for Appellant.

*S. P. Khambatta* for Respondents.

Their Lordships' Judgment was delivered by

LORD ATKIN.—This is an appeal from the High Court of Judicature at Fort William in Bengal which reversed the judgment of the District Judge at Pabna on an application by the respondents for the revocation of the probate of a will of an alleged testator Haralal Saha, which had been obtained by his widow, who is the appellant, in the year 1933. The circumstances were that Haralal Saha was a man of some age and had been very successful in his business, which was principally that of a moneylender. He owned immovable property in several districts in Bengal and in one district outside. He died in 1927 and, upon his death, there can be no doubt, that his three sons who survived him took possession of the properties. In some instances they had joined in a suit with their mother and were substituted for their father in a partition suit, They got a certificate of succession to enable them to sue on certain debts which were due, no doubt, on the moneylending business. They collected the rents of the immovable properties and they proceeded, both they and the widow, precisely as they would have proceeded if there had been an intestacy.

It would appear that the sons did not pursue the moneylender's business which, at any rate, in five or six years' time had, as the learned Judges found; disappeared; but they had in the name of a company conducted a business in electric lighting equipment, and they had incurred a debt to the present respondents, also for the purpose of their business, of 5,000 rupees. In November, 1933, the respondents had obtained a decree against them for 5,000 odd rupees. Their Lordships have no doubt that at that time they were in financial difficulties, as is shown by the fact that in the next year they were adjudicated insolvents. In February, 1933, more than six years after the death of the alleged testator, the present appellant applied for probate of a will which she produced then for the first time. It is not surprising that that attracted a good deal of suspicion. The respondents came to the conclusion that the will was a forged document and in August, 1935, they applied for revocation of the probate.

The first question that arises is more or less a technical question as to whether or not the respondents had a *locus standi* so as to be in a position to apply for revocation of the probate. That depends upon certain clauses in the Succession Act, 1925. By section 263 "The grant of probate may be revoked for just cause." By the explanation, "just cause shall be deemed to exist where"—only three of them need be read—

"(*a*) the proceedings to obtain the grant were defective in substance or (*b*) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case, or (*c*) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently."

It may be noticed that the section does not deal expressly, so far, with forgery, but one of the illustrations given in the section is (iii), "The will of which probate was obtained was forged or revoked." The question arises whether the creditor of an heir who says that he is being or is likely to be defeated in his rights against the heir by reason of property which otherwise appeared to be in possession of the heir being withdrawn by a will, is allowed to move to revoke the probate. Attention has been called to section 283, which provides: "In all cases the District Judge may"—then

"(*c*) issue citations calling upon all persons, claiming to have any interest in the estate of the deceased, to come and see the proceedings before the grant of probate."

It is suggested that it is only those persons who could be cited before the grant of probate who are the persons who could apply to revoke the probate. In their Lordships' view that is putting it on much too narrow a footing. One

of the grounds for revoking probate is that the grant was obtained fraudulently by making a false suggestion, which obviously covers the case of putting forward a forged will, just as (*c*) would cover the case of a person putting forward a forged will even if when he or she propounded it he or she did not know it was a forged will.

In dealing with the first point, that the grant was obtained fraudulently, it appears to their Lordships to follow as a matter of course that if a person is complaining that he has in fact been defrauded, he is one of the persons who is injured by the fraud alleged and that that person is entitled to have his redress by applying to revoke the probate and thereby cause the fraud to become inoperative. If he had not such a right as that, it is very difficult to know what right a creditor in those circumstances, or a person injured by the fraud, could have, otherwise the probate would stand and he would be affected by the probate which had been obtained *ex hypothesi* fraudulently. That is the view which was taken by their Lordships in *Rajah Nilmoni Singh Deo Bahadoor* v. *Umanath Mookerjee*[1]. It has been followed since in Calcutta, and their Lordships feel satisfied that in this case the applicants for revocation had every ground for applying and had a proper *locus standi* to come into Court and ask that the probate should be revoked.

Thereupon the further question remains to be determined as to whether or not this will was fraudulent. The learned District Judge, after dealing with the circumstances and the evidence, came to the conclusion that though the facts were suspicious, he was not prepared to go so far as to hold that forgery had in fact been committed and dismissed the application. The learned Judges in the High Court took a different view, and they were both of them quite clearly of opinion that the applicants had established affirmatively that this will was a forged will. That being so, it is unnecessary for their Lordships to deal with the question of onus of proof which in this case does not arise in view of the findings by the High Court.

When their Lordships have to deal with the question of whether or not a document is forged, it is obviously of first importance that they should have the document before them. Their Lordships repeat what was said at the beginning of these proceedings, that it should be considered to be a rule of practice in all cases where the genuineness of a document is in issue, that the parties concerned should bring before their Lordships, either the original document or, at any rate, a photostatic copy of it, so that their Lordships should be in the same position as the Courts in India or elsewhere, of having the document before them and being able to form their own impression upon an inspection. It is so important that, as a general rule, it is probable their Lordships would find it necessary to adjourn any case for the production of such a document if it were not forthcoming. In this case, their Lordships have had the advantage of a very full description of the document by one of the learned Judges, Mitter, J., by whose very careful account their Lordships have been very much assisted, for it enables them to deal with the issue satisfactorily even though they have not the actual will before them.

It is unnecessary, in their Lordships' opinion, to go through the details which have led the High Court to come to the conclusion that this was a forged document. Their Lordships are entirely satisfied with the judgment of the two learned Judges, which they consider to be convincing ; but it is enough to say that the circumstances under which the will was produced in the first instance and the conduct of the parties throw so much suspicion upon the existence of a will that when the document is looked at it is very easy to see that they are face to face with a document which obviously was prepared after the event and which was not a genuine will of the alleged testator.

The will is signed upon paper which there is plenty of evidence to show was used by the testator in his business for the purpose of the numerous legal proceedings which, in his course of business as a money-lender, he would be engaged in for the purpose of having papers and so forth put before before the Court. They

1. (1907) L.R. 10 I.A. 80 : I.L.R. 10 Cal. 19 (P.C.).

were papers which the testator was in the habit of signing in blank, signing at the bottom, and occasionally both at the bottom and at the top. This will is written on two such sheets, the first of them signed at the top, the second one signed at the top and at the bottom in the extreme right-hand corner. It is sufficient to say that, upon the appearance of the document, it is reasonably plain that the man who wrote the document was not able to complete the will in such a form as to fit in with the signature so as to make the signature in any sense approximate to the body so as to authenticate the body. The result was that there was a gap of at least two and a half inches which was not filled in at all. Then there was a form which indicated that it was signed by the testator as his last will, which was drawn at the bottom of the page so as to coincide with and approach the signature. In other words, the document is drafted to fit into the signature, and the signature was not put there in order to authenticate the document.

It is unnecessary to deal with all the matters which have been referred to by the learned Judges which help their Lordships to come to the conclusion that this was a forged will. Their Lordships have no doubt at all that the conclusion of fact was well warranted and was in fact right. In those circumstances the appeal fails and must be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Solicitors for Appellant: *W. W. Box & Co.*

Solicitors for Respondents: *T. L. Wilson & Co.*

V.S. *Appeal dismissed.*

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## [PRIVY COUNCIL.]

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD THANKERTON, LORD PORTER AND SIR GEORGE RANKIN.

Krishna Kant Prasad Shukul and another .. *Appellants**

*v.*

Dhanu Lal Choudry and others .. *Respondents.*

*Civil Procedure Code (V of 1908), Order 32, rule 4 (Patna)—Suit on mortgage executed by Hindu father having minor sons—Appointment of pleader as guardian for the minors on the father's refusal to receive notices to act as such, though mother was alive—Validity—Suit decreed in spite of strenuous contest by pleader guardian—Subsequent suit by mother on behalf of the minors to set aside the decree—Attempt to avoid liability by pleading that the debts were incurred for immoral purposes—Permissibility.*

A Hindu father executed a mortgage on behalf of himself and his minor sons. In a suit on the mortgage, the father, who was suggested by the mortgagee as the guardian for his minor sons, refused to receive notices to act as such and hence a pleader was appointed guardian for the minors. The mother of the minors was alive. The suit was decreed in spite of a strenuous contest by the pleader guardian. Thereafter the mother of the minors filed a suit on their behalf to set aside the decree as against them and contended that the appointment of the pleader as guardian ignoring the existence of the mother was improper and that the debts in question were incurred by the father for immoral purposes—a contention not put forward by the guardian in the suit.

*Held*, that as there was no evidence that the mortgagee concealed the fact of the existence of the mother from the Court in the mortgage suit or practised any species of fraud or concealment and as the pleader guardian had done all that he properly could, no case of fraud or negligence could be maintained. The mother was not the natural guardian of the minors and the Court might very properly regard her as being like her husband a person with an interest adverse to the minors, unlikely as a pardanashin to be capable of handling troublesome litigation. In the circumstances, the appointment of a pleader guardian was the most sensible and proper course to take in the interest of the minors. The charge of immorality against the father would not have been of any use to the minors in the mortgage suit and in any event the absence of this line of defence is not to be attributed to the irregularity in the appointment of the guardian. No good reason had been shown for setting aside the decree.

*S. P. Khambatta* for Appellants.

*Phineas Quass* for Respondents.

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* P. C. Appeal No. 51 of 1940. 19th October, 1943.

Their Lordships' Judgment was delivered by

SIR GEORGE RANKIN.—The appellants are the two minor sons of respondent 9 Bate Krishna Prasad. By their mother Sm. Avadesh Dulari Debi they sue to have a mortgage decree dated 18th December, 1931, set aside as against them and to establish that their interest in the joint family property is not liable for the monies due thereunder. The mortgagees who obtained the decree of 1931 are respondents 1 to 7, herein called the respondents. Respondent 8 is a puisne mortgagee and need not be further mentioned. The present suit was brought on 26th July, 1933, in the Court of the Subordinate Judge at Muzaffarpur. The appellants succeeded in the trial Court whose decree was dated 16th December, 1935, but the High Court at Patna on 9th March, 1939, dismissed their suit.

The mortgages in question are three in number and were executed by the appellants' father (respondent 9) in terms which purport to bind their interests. (1) The first dated 19th July, 1924, was for Rs. 20,000. Apart from a small sum of Rs. 200 and a sum of Rs. 400 borrowed to pay the costs of the mortgage, this loan was expressed to be made—as to Rs. 9,098, to pay off a previous loan made by the respondents on a bond dated 16th August, 1917; as to Rs. 4,650, to pay off a decree in favour of one Shyam Nundan Sahay; and as to Rs. 5,650 to meet a decree for maintenance obtained by a lady called Deokeshari. These debts were not incurred for the benefit of the joint family but as antecedent debts of the father, respondent 9, they have been held by the High Court to come within the principle that a father can mortgage the joint property to discharge a debt contracted by him for his own personal benefit. (2) When the second mortgage, dated 28th March, 1925, came to be made it appeared that the whole sum of Rs. 5,650 had not in fact been paid to Deokeshari but only Rs. 2,600; and that she was taking execution proceedings for the balance which by this time amounted to Rs. 7,300. Apart from Rs. 255 borrowed for the costs of the mortgage, Rs. 4,745 was taken to save certain properties which had been put up for sale. The High Court have found that the mortgagees took care to see that the money was this time applied to the discharge of the maintenance decree but that a stay of the sale could not be obtained; and that in the end the money or the bulk of it was expended for the purpose for which it was taken by buying back the properties in the name of a nominee. (3) The third mortgage was on 18th May, 1926, for Rs. 2,500. Of this, Rs. 2,090 was expressed to be taken to pay off one Noorullah or Sadhulla Khan who had lent money on a hand-note to meet revenue and cesses, repairs to the family house and for clothes. The rest was said to be necessary to meet medical expenses. The High Court have found that there was such a hand-note, and that it was paid off with the money borrowed for the purpose.

On the merits the appellants' case which the trial Judge accepted was that their father, respondent 9, was addicted to evil habits, was borrowing the monies in question for immoral purposes and was spending them upon intoxicating drink and prostitutes. In addition to a body of general evidence as to his bad character and depraved habits, the appellants made a positive case that the sum exceeding Rs. 10,000 received by him from the first mortgage (19th July, 1924) or the great part of it was immediately squandered upon prostitutes. They called four witnesses to prove the division of the money among such women. The trial Court accepted their evidence; but the High Court regarded them as unworthy of credit and on a careful examination of their evidence rejected their story as one which had broken down. Their view in the end was that however successful the appellants may have been in attacking their father's character, they have not succeeded in connecting the loans which are now in question with the immorality alleged.

The initial difficulty of the appellants is to get behind the mortgage decree of 1931 which was passed against them in a suit (No. 92 of 1930) in which, by one Mahendra Prasad Sinha, a pleader, as their guardian *ad litem*, they had contested the claim of the mortgagees. A written statement filed on their behalf had denied the passing of any consideration for the mortgage bonds, and pleaded that there

was no legal necessity for the loans and no benefit to the family. A careful judgment dealt very fully with the consideration for the loans at the instance of the guardian and also of a puisne mortgagee who also had put the mortgagees to strict proof of their claim. The execution of the bonds was held to have been proved, as also were the various payments, including the payment of Rs. 10,502 under the first mortgage by a cheque on the Benares Bank at Muzaffarpur. The learned Subordinate Judge dealt separately with each of the three loans, finding that the first was for antecedent debt and for legal necessity, that due enquiry as to legal necessity had been made as to the second, and that the third was for legal necessity. The appellants, notwithstanding their guardian's strenuous contest on their behalf, claim to reopen the question of their liability on the bonds by introducing as a new defence an allegation that the loans were taken by their father for immoral purposes or to discharge antecedent debts incurred for such purposes. They say also that their mother should have been appointed to be their guardian in the mortgage suit and that had she been guardian she would have put forward the immoral habits of her husband as a defence. On this question the Courts in India have differed in opinion. The learned trial Judge has held that the mortgagees fraudulently concealed the fact of the mother's existence, that the pleader guardian was negligent, and that the minors were not represented or not properly represented in the mortgage suit. The High Court have negatived these findings of fraud and negligence and held that there were reasons against the appointment of the mother as guardian and that even if it was wrong to pass her over this was at most an irregularity which would not entitle the appellants to have the decree set aside.

Their Lordships find themselves in agreement with the High Court upon this aspect of the case. There is no evidence that the mortgagees concealed the fact of the mother's existence from the Court in the mortgage suit or practised any species of fraud or concealment. Indeed while the order sheet in that case was put in evidence the mortgagee's petitions and affidavit are not even in the record, though the present case was begun only two years after the mortgage suit was decreed. Hence the exact statements made to the Court by the mortgagees are not proved. The evidence shows the pleader guardian to have done all that he properly could. He even asked to be allowed expenses for a journey to the appellants' village to collect information on the spot, but this the learned Judge in his discretion refused, intending him to get his instructions by post. In their Lordships' view no case of fraud or negligence can be seriously maintained, and the sole question which requires consideration is whether there was in the appointment of a pleader guardian an element of irregularity which has prejudiced the minors. In the plaint it is faslely stated that no notice of the mortgage suit was served on respondent 9 and it is alleged that "without issue of any other notice a pleader was appointed as guardian *ad litem* for the plaintiffs." That the mother should have been appointed is not pleaded, and their Lordships think that the Court might very properly regard her as being in this case like her husband a person with an interest adverse to the minors, unlikely as a pardanashin to be capable of handling troublesome litigation and only too likely to be under the influence of her husband. She was not the natural guardian of the minors. The mortgagees were wrong in thinking that respondent 9 had not an interest adverse to the minors but they did no more than was usual when they put forward the name of respondent 9 as being the natural guardian and as the person in whose care the minors were. He had to have notice but if the Court had appointed him then indeed the minors would have had a grievance as his interest was adverse. What happened was that he refused service and the notices had to be affixed to a door at his residence. The plaintiffs on 17th September, 1930, asked the Court to appoint someone else and on 10th November they were ordered to take steps to have a registered card issued to him by the Court. A number of such communications were sent to him. The pleader was not appointed till 17th November. In January, 1931, respondent 9 appeared and asked for time to file his defence ;

he was given time till 12th March, but made default; and the case was not heard till the following November.

It appears that clause 4 of rule 4 of Order 32 of the Code was in 1927 amended by the Patna High Court so as to substitute for the words "where there is no other person fit and willing to act as guardian for the suit" other words, namely, "where the person whom the Court . . . . proposes to appoint as guardian for the suit fails . . . . to express his consent to be so appointed." The substance of the matter, in any case, is that the appointment of a pleader guardian was the most sensible and proper course to take in the interest of the minors. Their Lordships are far from thinking that a charge of immorality against respondent 9 would have been of any service to the minors in that suit, but in any view of the matter, the absence of this line of defence is not to be attributed to irregularity in the appointment of the guardian. A very full enquiry was made into the circumstances of and the consideration for the loans and in their Lordships' judgment no good reason has been shown for setting aside the decree which was passed. They will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of respondents 1 to 7, who alone appeared.

Solicitors for Appellants: *A. J. Hunter & Co.*

Solicitors for Respondents: *Douglas Grant and Dold.*

V.S. *Appeal dismissed.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE HORWILL.

Guruva Vannan .. *Appellant.**

*Criminal Procedure Code (V of 1898), section 162—Omission from the record in the case diary—Value of.*

All that investigating officers are expected to do is to make a short record of what the witnesses examined by them have said. They are not expected to record the important details given by witnesses, and so absence of such details in the case diary is no proof at all that the statements were not made by the witnesses. The Court should permit a statement recorded under section 162 of the Criminal Procedure Code to be used for the purposes of proving an omission only when it is sure that the omission could not have occurred if the statement had really been made.

An omission from the record in the case diary of a statement is only of value if it is of such importance that the witness would almost certainly have made it and the policeofficer would almost certainly have recorded it, had it been made.

*Ponnuswami Chetty* v. *Emperor,* (1933) M.W.N. (Cr.) 2; *Emperor* v. *Nadimpalli Bangararaju,* (1942) M.W.N. (Cr.) 10 and *Queen-Empress* v. *Nasiruddin,* (1894) I.L.R. 16 All. 207, followed.

Trial referred by the Court of Session of the Trichinopoly division for confirmation of the sentence of death passed upon the prisoner in C. C. No. 59 of 1943 on 22nd October, 1943 and appeal by the said prisoner.

*N. Kotyswara Rao* for Appellant.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court delivered the following

JUDGMENTS: *Horwill, J.*—The appellant has been convicted by the learned Sessions Judge of Trichinopoly of the murder of his daughter-in-law, Sellayi, at about 1 p.m. on the 29th June, 1943, and sentenced to death.

P. Ws. 3 and 4, the brother and sister respectively of the deceased, claim to be eye-witnesses. They say that the appellant had been frequently coming to their house and asking the deceased, their sister, to come and live with him. She had consistently refused to do so. On the day of the offence, at about noon, he twice asked their sister to come to his house; but she again refused. Thereupon, the accused came with a spear and stabbed her on her cheek with such force as to cause the stick to break off. Seizing the spear head with his hand, he stabbed the deceased in the abdomen and other places. She rushed into the street and dropped down dead. P. W. 3 at once went off to fetch P. W. 8, a respectable neighbour, who,

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* Referred Trial No. 234 of 1943.
Crl. Appeal No. 808 of 1943. 14th December, 1943.

upon seeing what had happened, went to the house of the accused, seized him, and tied him up. There were many persons living in the neighbourhood ; and some of them have deposed that upon hearing the cry of the deceased they came running to the spot and saw the deceased woman lying near her house stabbed to death. P. W. 7 asked P. W. 4 what had happened ; and she replied that her uncle (appellant) had stabbed the deceased. The evidence of P. W. 8 is important. He came at once upon being called by P. W. 3 and after he had seen the body, went with others to the house of the appellant and asked him why he had stabbed the deceased. The appellant replied that she had not been behaving properly in the family and so he had stabbed her. They tied up the appellant in the chavadi and went and informed the village Magistrate, who lives a mile and a half away. The village Magistrate P. W. 9 came and then reported the matter to the police.

The evidence of some of these witnesses is sought to be discredited because certain statements made by them during the course of their examination in the Sessions Court do not appear in the case diary of the police. P. W. 13, the police officer who conducted the investigation, is one of those foolish investigating officers who think the law requires of them that they should record verbatim what every person says to them ; and so when they are asked in cross-examination by the counsel for the accused whether such and such a witness made such and such a statement, they refer to their case diary and if it does not find a place there, they at once say that the witness did not make that statement. It is most unlikely that P. W. 13 remembered whether P. W. 6 and P. W. 8, about whose statements he was questioned, made the statements referred to ; and so we presume that merely because these unimportant particulars do not find a place in the summary of the statements of those witnesses recorded in the case diary, the witness said that they did not make those statements. We think it desirable that the Judge should ask such police witnesses when they give answers of this kind, whether they are speaking from memory, or whether they have given the answers they have merely because the statements do not find a place in the case diary. All that investigating officers are expected to do is to make a short record of what the witnesses examined by them have said. They are not expected to record the unimportant details given by witnesses ; and so the absence of such details in the case diary is no proof at all that the statements were not made by the witnesses. I agree with my learned brother that a Court should permit a statement recorded under section 162, Criminal Procedure Code, to be used for the purpose of proving an omission only when it is sure that the omission could not have occurred if the statement had really been made. The passage from *Queen Empress* v. *Nasiruddin*[1] extracted by my learned brother in his judgment needs very careful consideration in this connection.

There is no reason to doubt the evidence of P. W. 8—supported as it is by the evidence of P. W. 5—that when the appellant was asked by P. W. 8 why he had committed this murder, he replied that he had done so because the deceased had not been behaving herself properly. The other evidence against the appellant is that a blood-stained cloth was recovered from his person—for which he has given no explanation—and also that the spear in two parts was recovered from the roof of his house. The stains on the cloth, as well as the stains on the spear-head, were found to be of human blood.

The statement of the accused in the Magistrate's Court was to the effect that he was seized because he happened to have been present when neighbours came on the scene and suspicion fell on him on that account. In his statement in the Sessions Court, however, he says, that this case was foisted on him on account of the enmity borne towards him by P. W. 8 who was intimate with the deceased and who bore him a grudge because a cloth belonging to his wife had been lost in the wash.

1. (1894) I.L.R. 16 All. 207.

I consider that the case against the appellant has been fully proved and that there is no doubt at all that he committed the murder of the deceased Sellayi. Of the many injuries found on the person of the deceased, two are each in itself fatal. In the absence of extenuating circumstances, the sentence imposed by the learned Sessions Judge was the proper one.

I am of opinion that the conviction and sentence should be confirmed and the appeal dismissed.

*Mockett, J.*—The facts are quite clear and it is unnecessary to say more than that.

I agree with the result at which my learned brother has arrived. I desire to add some remarks about the use of section 162, Criminal Procedure Code. I respectfully agree with the judgment of Burn, J., in *Ponnuswami Chetti* v. *Emperor*[1], in which the learned Judge held that a statement under section 162, Criminal Procedure Code, cannot be filed in order to show that a witness is making statements in the witness-box which he did not make to the police and that a bare omission cannot be a contradiction. The learned Judge points out that whilst a bare omission can never be a contradiction a *so called* omission in a statement may sometimes amount to a contradiction, for example, when to the police three persons are stated to have been the criminals and later at the trial four are mentioned. Section 162 provides that no statement made by any person to a police officer in the course of the investigation shall (1) if reduced into writing be signed by the person making it, (2) be used for any purpose "save as hereinafter provided" at any subsequent inquiry or trial. The proviso is to the effect that it can be shown that a witness has made statements to the police which are contradictory to his evidence in the witness-box. The position is that a witness cannot be cross-examined with regard to statements that he made to the police, unless the statements are contradictory. With regard to a statement made in the witness-box but not alleged to have been made to the investigating officer, I also respectfully agree with the judgment of Horwill, J., in *Emperor* v. *Nadimpalli Bangararaju*[2], where he deals with this topic and with which judgment Burn, J., agreed. The learned Judge observed as follows :

> "Where it is alleged that the statement made by the witness in Court was not made before the police officer, it is useless to refer to the record in the case diary at all, for what is recorded in the case diary is not intended to be a complete record of what a witness tells the police officer. It is only a resume of the statement, made by the police to facilitate their investigation. The only way to prove that the statement made in Court was not made to the police officer is to ask the police officer himself when he is in the witness-box."

In other words, the police officer can be asked whether it is a fact that a certain statement was *not* made to him. It seems also that it is the practice in the criminal Courts in this Presidency to allow a witness to be asked whether he did not make certain statement, which he has made in the box, to the investigating officer. In assessing the value of this evidence the following must be borne in mind. Supposing a witness is asked "you did not say so and so to the police?" or a police officer is asked "the witness did not say so and so to you?" If the answer by either the witness or the police officer is "I (or he) did make the statement," the answer is inadmissible under section 162. So a question is on the record to which only one answer is admissible and another answer is inadmissible. It follows too that if the police officer states that a certain statement was not made by the witness, the witness is not allowed to say that he did make it. Such statement is not signed by the witness and he has to say as to which of his answers to the officer's questions are or are not recorded. In this connection it must also be remembered that a witness is speaking of a conversation which took place usually months before. The police officer is also speaking of a conversation recorded by him months before and in his case he must usually be having regard to what is contained in his case diary. It has over and over again been pointed out by this High Court that it is not the duty of the investigating officer to do more than record a gist of the statements made to him. The Madras Police Standing Order No. 555 whilst instructing the investigating officer to record "a statement of the circumstances ascertained"

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1. (1933) M.W.N. (Cr.) 2.
2. (1942) M.W.N. (Cr.) 10.

expressly states that "the police are under no obligation to record verbatim the statements of persons examined." I respectfully agree with the observations of Knox and Burkitt, JJ., in *Queen-Empress* v. *Nasiruddin*[1]. Speaking of the statements recorded in the course of investigation the learned Judges observed :

"Such statements are recorded by police officers in the most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material to the case at that stage and omit many matters equally material, and, it may be, of supreme importance as the case develops. Besides that, in most cases they are not experts of what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion, subject to frequent interruption and suggestions from bystanders. Over and above all, they cannot be in any sense termed depositions, for they are not prepared in the way of a deposition, they are not read over to, nor are they signed by, the deponents. There is no guarantee that they do not contain much more or much less than what the witness has said."

It is not the duty of the police when investigating a crime to record a long and detailed deposition. Their business is to make a note of such facts and circumstances as then seem to them important and useful for the purpose of the case. But it is the practice of some Sessions Judges to treat statements made to the police in the course of an investigation as being in the nature of depositions and if it should appear that they are not as complete as their subsequent statements before the Court, to treat their evidence as a whole with great suspicion. One of the commonest examples is where a witness is asked in the witness-box (probably for the first time), "Did you inform *X*, *Y* or *Z* of what you had seen?" The case diary reveals that there is no record that he said that he had so informed *X*, *Y* or *Z*. The explanation of the police officer that he had not recorded more than what the witness stated that he had seen is seldom considered. I agree with my learned brother that the Court should make sure whether when a police officer says "the witness did not say this or that," that he means that statement literally and not that he is saying "I do not find it in the case diary." There is a very great distinction between the two positions. My general conclusion on the subject is that an omission from the record in the case diary of a statement is only of value if it is of such importance that the witness would almost certainly have made it and the police officer would almost certainly have recorded it, had it been made. So much of the cross-examination in the Sessions Courts seems now to be directed to irrelevant omission in the case diary that I think the above observations are necessary. An immense amount of unnecessary writing is imposed upon the Sessions Judge who still under the present procedure has to record the evidence in long hand. An example may be taken from the case before us. P. W. 6 stated at the Sessions "on a Tuesday about 3 months ago at midday meals time I was taking meals in my house. Then I heard a noise 'ayyo, ayyo' from the house of P. W. 2." He was cross-examined to show that he did not tell P. W. 13, the Head Constable, that he was taking meals in his house when he heard the noise, nor did he state that the cry was heard from the house of P. W. 2. Under our powers we had recourse to the case diary and found that the witness had stated that he was in his house and heard an alarm. The recording of this cross-examination, a complete waste of time, must have occupied the learned Sessions Judge several minutes. It is right to say that he attached no importance to it. I have already indicated that I entirely agree with the result at which my learned brother has arrived.

V.P.S. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT :—MR. JUSTICE BELL.

Divanjee Dhadha Abdula Saheb .. *Plaintiff**

*v.*

P. N. Guruvappa & Co. .. *Defendants.*

*Contract—Illegal contract—Contract for sale of yarn—Rules of Yarn Control Order violated—Suit for damages for breach—Maintainability—Contract Act (IX of 1872), section 56—Applicability.*

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1. (1894) I.L.R. 16 All. 207.

* C. S. No. 107 of 1943. 22nd November, 1943.

The plaintiff sued for damages for breach of a contract entered into by the defendants for supply of yarn. The defendants contended among other things that under the rules made under the Defence of India Act, 1939, the contract was illegal from its inception because the defendants had not obtained the necessary licence from the Yarn Commissioner and had therefore no right to sell the yarn at the place fixed for performance. It appeared that the contract was really an attempted evasion of the Yarn Control Order and that the defendants did not have the necessary licence, and that the plaintiff did not choose to inquire if they had a licence.

*Held*, that the contract was illegal *ab initio* and could not therefore be sued upon.

Observations of Lord Mansfield in *Holman* v. *Johnson*, (1775) 1 Cowp. 343 : 98 E.R. 1120 and In re *Mahmoud and Ispahani*, (1921) 2 K.B. 716, relied on.

*Held, further*, that the principle of section 56 of the Contract Act was not applicable to the case as the plaintiff had not made the necessary inquiry as to the defendants' having a licence.

*Krishnamachari* for Plaintiff.

*K. Narasimha Ayyar* instructed by *Subramaniam and Rajagopal* for Defendants.

The Court delivered the following

JUDGMENT.—The learned advocate for the plaintiff has conducted the case of his client with great ability and has said everything that could possibly be said in circumstances which, as I have already said in Application No. 2346 of 1943, were made extremely difficult for him by the way in which the defence was altered from time to time. I am afraid however, that I have no alternative but to accept the submission of the defendants—a submission of which little more than a hint was given to the plaintiff up to within a week of the trial. The point taken is that the contract on which the plaintiff sues was illegal *ab initio* that therefore the plaintiff cannot succeed and that his suit must be dismissed with costs. The words of Lord Mansfield in *Holman* v. *Johnson*[1] cited at page 602 in *Harry Parker, Ltd.* v. *Mason*[2] apply to this case :

> " The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed ; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this : *ex dolo malo non oritur actio*. No Court will lend its aid to a man, who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa* on the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes ; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it ; for where both are equally in fault, *potior est conditio defendentis*."

In In re *Mahmoud and Ispahani*[3], Scrutton, L.J., says :

> " In my view the Court is bound, once it knows that the contract is illegal, to take the objection and refuse to enforce the contract, whether its knowledge comes from the statement of the party who was guilty of the illegality, or whether its knowledge comes from outside sources. The Court does not sit to enforce illegal contracts. There is no question of estoppel ; it is for the protection of the public that the Court refuses to enforce such a contract."

In the present case, on the 19th September, 1942, by a contract in writing the plaintiff agreed to buy, and the defendants agreed to sell certain bales of yarn at an agreed price, delivery to be as soon as possible. The defendants found difficulty in giving delivery, and in a long series of letters the plaintiff continually pressed for and the defendants agreed to give delivery as soon as yarn was available. Later, the defendants offered another and different yarn, but the plaintiff did not accept this because of various difficulties as to price. Finally, the plaintiff set a limit of time for delivery, namely, the 31st March, 1943, and the defendants were not able to deliver. Ordinarily, therefore, the plaintiff would have a clear action for breach of contract and he would be able to recover the difference between the contract price and the market price on the date of the breach. The contract was made in Madras where the defendants have an office. As I have said in Application No. 2346 of 1943, the defendants in their written statement raise two

1. (1775) 1 Cowp. 343 : 98 E.R. 1120.
2. (1940) 2 K.B. 590.
3. (1921) 2 K.B. 716 at 729.

defences, (*a*) no contract and (*b*) novation. Not until the case was opened practically did they raise the point that under rules made under the Defence of India Act, 1939, the contract was illegal from its inception because the defendants had no right to sell yarn in Madras. Under section 2 (1) (*a*) of the Defence of India Act, the Government is empowered to make rules. Under rule 81 (2) the Yarn Control Order was made on the 1st August, 1942. This order prohibited the sale of yarn by persons other than the persons acting on behalf of a cotton spinning mill or persons having a licence in a form known as Form B. Evidently the Government desired to control the sale and distribution of yarn and restricted sales to persons who were duly licensed. On the 6th September, 1942, the defendants got a licence in Form B. That licence showed them as having an address in Madras, but the description of the premises where the business was to be conducted was given as Kamalapuram, Cuddappah District. The licence was to be for three months and was for a wholesale business. The licensees had to comply with numerous conditions. They had to maintain daily accounts showing the quantities of cotton yarn in hand and sold during each day, the quantities received and the quantities disposed of and the closing balance at the end of each day. They could be called upon to submit further returns. They had to issue to every customer correct receipts. Where a licensee was licensed to sell by retail, the quantities to be sold were to be not more than those authorised by the Provincial Yarn Commissioner. A wholesale licensee, such as the defendants, could only sell to a licensee. A correct list of cotton prices was to be displayed in the business premises. The agents of the Yarn Commissioner or the District Collector were empowered to enter upon the premises where cotton was kept or stored or exposed for sale. Licensees were forbidden to have in their possession yarn in excess of the quantities revealed by their accounts and any such excess might be confiscated.

The defendants' licence expired on the 6th December and the defendants were informed previously that it would not be renewed. I am told that the reasons for this were that the defendants had not been long enough in the yarn trade and that the Government encouraged only yarn merchants of long standing and experience. On the 16th February, 1943, a further order was passed revoking the previous order, known as the Madras Yarn (Dealers) Control Order, 1943. It repeats a good deal of what was in the earlier Order, especially with regard to the definition of a dealer, namely, "a person who sells, stores for sale or carries on any business in cotton yarn," and the Order provides, as did the earlier one, that no person should carry on business as a dealer in this Province unless he has a licence issued under this Order. The defendants had a licence for three months during which time they made this contract. Had they made the contract to sell the goods which were in their possession in Kamalapuram, no doubt the contract would have been a good one. But this contract was made in Madras and was to sell goods which were certainly not in Kamalapuram. The defendants, therefore, were purporting to make a sale in a place where they had no licence and it will be noted that in the application form for a licence, form A in the schedule to the Order, the exact description of the premises where the applicant will sell, store for sale or conduct business in cotton yarn has to be given, and in the defendants' case, this was given as Kamalapuram. There can be no doubt that this contract was an attempted evasion of the Order and was therefore illegal in that the defendants had no right and were forbidden to enter into it. In the circumstances, the authorities to which I have just referred apply and the plaintiff's case must fail.

It was further urged by the defendants that the plaintiff himself was in fault in that he had no licence. This was said to me during the hearing as a further argument on the defendant's side. Had it been true, the defendants would have been doubly in error because one of the conditions of the Order is that a wholesale licensee, which the defendants were, should sell only to a licensee. But the plaintiff was able to prove very quickly that not only had he got a licence but that he had one before the defendants had acquired theirs and he has retained this even to-day because he is a merchant of substance and long standing. There was nothing, therefore, in that point put forward by the defendants.

The plaintiff's counsel has urged with great plausibility that section 56 of the Contract Act applies in this case and that the plaintiff is not bereft of relief. The second part of the section says :

> " Where, one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

Counsel for the plaintiff urges that the plaintiff here could not possibly know, and it was not reasonable to expect him to ask whether the defendants had a licence to sell yarn in Madras. The plaintiff might be entirely innocent, but it is difficult to believe that a yarn merchant of his experience would not have made some inquiry, familiar as he himself must have been with all the rules and conditions which since August, 1942, have applied to the yarn trade. Had it been possible for me to come to the conclusion that he could not be put on inquiry I would certainly have allowed the plaintiff to amend his plaint by adding a claim under the second part of the section. I have seen the plaintiff in the witness-box and I have read the rules and conditions, and I think that any prudent businessman in this trade would have required the defendants to show that they were fully entitled to deal in yarn and to fulfil the contract. The absence of any knowledge on the plaintiff's part that the defendants had no licence and on the defendants' part that the plaintiff had a licence inclines one to think that the contract was one of those which the rules were intended to prevent, namely, a transaction in yarn at a place where no licence was issued and where no control therefore could be exercised.

In the result, I find that as the contract was illegal *ab initio* the plaintiff's case must fail in that the Court can do nothing to assist him, and it must be dismissed with no order as to costs in the suit. The plaintiff will have all the other costs which have been ordered up-to-date.

B.V.V. ——— *Suit dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUNHI RAMAN.

Siva Subramania Chettiar, minor by natural father and guardian Veerappa Chettiar .. *Appellant**

*v.*

Adaikkalam Chettiar and others .. *Respondents.*

*Civil Procedure Code (V of 1908), Order 47, rule 1 and section 151—Application for execution dismissed for default—Review cannot be granted—Desirability of amending Order 9, rule 15, Civil Procedure Code, indicated.*

Where when an application for execution was called neither the petitioner's pleader nor the next friend of the petitioner was present,

*Held*, that the absence of counsel is not a ground for review and the same principle must be applied when the party is also absent even though a good ground of adjournment was later brought to the notice of the Court.

*Narayana Chettiar* v. *Muthu Chettiar*, (1925) 51 M.L.J. 219 : I.L.R. 50 Mad. 67 *Vemaredd Ramaraghava Reddi* v. *Raja of Venkatagiri*, (1926) 52 M.L.J. 123 ; *Srinivasam Pillai* v. *Rukman Ammal*, (1927) 55 M.L.J. 330 ; *Neelaveni* v. *Narayana Reddi*, (1919) 37 M.L.J. 599 : I.L.R. 43 Mad. 94 (F.B.) ; *Chhajju Ram* v. *Neki*, (1922) 43 M.L.J. 332 : L.R. 49 I.A. 144 : I.L.R. 3 Lah. 127 (P.C.) and *Nathu Lal* v. *Raghubir Singh*, (1925) I.L.R. 48 All. 160, followed.

*Subbaraya Devai* v. *Sundaresa Devai*, (1932) 36 L.W. 586, disapproved.

Desirability of amending Order 9, rule 15, Civil Procedure Code, so that a Court may in suitable circumstances set aside an order of dismissal of an execution petition passed for default of appearance pointed out.

Appeals against the judgment and order of the High Court (Horwill, J.), dated 29th July, 1943, and passed in A. A. O. Nos. 569 of 1942 and 98 of 1943, preferred against the order of the District Court of West Tanjore at Tanjore dated

* L. P. As. Nos. 68 and 69 of 1943. 10th December, 1943.

23rd October, 1942, in E. A. No. 257 of 1941 in E. P. No. 67 of 1935 in O. S. No. 6 of 1923.

*R. Gopalaswami Aiyangar* for Appellant.

*A. V. Viswanatha Sastri, K. Srinivasan* and *K. S. Ramamurthi* for Respondents.

The Judgment of the Court was delivered by

*The Chief Justice.*—The appellant, who is a minor, is the holder of a decree for mesne profits which was passed in favour of his adoptive father on the 14th November, 1923, in a suit for partition. By his next friend he presented various petitions for execution. The last petition was dismissed for default on the 4th April, 1941. On the 18th April, 1941, his next friend, who at that time was his natural father, his adoptive father being dead, applied for a review of the order of dismissal. The District Judge granted the application, not as one falling within Order 47, rule 1, Civil Procedure Code, but because he felt that the dismissal of the execution application would work great hardship, as it was too late to file a fresh one, and consequently it was, according to him, a case in which the Court should invoke the inherent powers recognised by section 151. There were three judgment-debtors. Two of them filed C. M. A. No. 569 of 1942 and the third, C. M. A. No. 98 of 1943. These appeals were heard by Horwill, J., who allowed them. The present appeals are from the judgment of Horwill, J., under clause 15 of the Letters Patent.

When the application for execution was called on the 4th April, 1941, neither the appellant's pleader nor his friend was present. In the petition asking for a review it was stated that another pleader had applied for an adjournment, but there is nothing on the record to support this and the District Judge does not make mention of any such application in his order allowing the review. Whether there was an application of this nature or not does not really matter. The reason given for the non-appearance of the next friend was that his wife had been taken ill suddenly and this had prevented him from attending Court.

There are several decisions of this Court which say that the absence of counsel is not a ground for review and it follows that the same principle must apply when the party is also absent. The decisions of this Court in point are *Narayana Chettiar* v. *Muthu Chettiar*[1], *Vemareddi Ramaraghava Reddi* v. *Raja of Venkatagiri*[2] and *Srinivasam Pillai* v. *Rukmani Ammal*[3]. The question whether the inherent power of the Court could be invoked was discussed in *Vemareddi Ramaraghava Reddi* v. *Raja of Venkatagiri*[2] and it was held that it could not. Obviously in view of the decision of the Full Bench in *Neelaveni* v. *Narayana Reddi*[4], this argument was not open. In *Vemareddi Ramaraghava Reddi* v. *Raja of Venkatagiri*[2], the Court also held that a review was incompetent in view of the limited scope of Order 47, rule 1, as explained by the Privy Council in *Chhajju Ram* v. *Neki*[5] and *Nathulal* v. *Raghubir Singh*[6].

As before Horwill, J., Mr. Gopalaswami Aiyangar has dwelt on the judgment of Ramesam, J., in *Subbaraya Devai* v. *Sundaresa Devai*[7]. In that case an application for leave to sue *in forma pauperis* had been dismissed for default after an application for an adjournment had been refused and the question was raised whether the discovery by the Court late of a reasonable ground for an adjournment was a good ground for reviewing the order of dismissal. Although he refused to interfere with the order of dismissal in that case, Ramsam, J., considered that the later discovery by the Court of a good ground for an adjournment was sufficient to warrant the granting of an application for review. These observations cannot be accepted in view of the Bench decisions to which reference has been made; but even if we were not bound by authority we could not agree with them. As on the

1. (1925) 51 M.L.J. 219 : I.L.R. 50 Mad. 94 (F.B.).
2. (1926) 52 M.L.J. 123.
3. (1927) 55 M.L.J. 330.
4. (1919) 37 M.L.J. 599 : I.L.R. 43 Mad. 67.
5. (1922) 43 M.L.J. 332 : L.R. 49 I.A. 144 : I.L.R. 3 Lah. 127 (P.C.).
6. (1925) I.L.R. 48 All. 160.
7. (1932) 36 L.W. 586.

authorities an application for review did not lie and as there is no scope here for the exercise of the inherent of power of the Court, the appeals must be dismissed with costs.

The case appears to be one of great hardship and suggests that a case has been made out for an amendment to rule 15 of Order 9, Civil Procedure Code, so that a Court may in suitable circumstances set aside an order of dismissal of an execution petition passed for default of appearance. After this Court had held in *Arunachalam* v. *Veerappa Chettiar*[1], that Order 9 did not apply to execution proceedings, rule 15 was inserted in order to make the order applicable in execution proceedings so far as the judgment-debtors are concerned in cases analogous to those dealt with in rules 6, 13 and 14. Rule 9 applies to the dismissal of a suit for the default on the part of the plaintiff and at the moment we can see no room why this rule should not be made to apply to the dismissal of an application for execution for default. Of course, where by default an execution petition is dismissed and the period of limitation has not expired, the decree-holder can file a fresh application; but where the application has been dismissed for default and the decree-holder cannot then file a fresh application by reason of the law of limitation, there should be some provision of law which allows him to get the order of dismissal set aside if he can show that he was prevented by sufficient cause from appearing.

V.P.S. ——— *Appeals dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

T. S. Rajam and another .. *Appellants**

*v.*

Pankajam Ammal and another .. *Respondents.*

*Indian Succession Act (XXXIX of 1925), section 141—Nephew of testator mentioned as executor and legatee under the will—Renunciation of executorship—Not entitled to benefit under the will as legatee irrespective of his ignorance of consequence of renunciation of executorship.*

The two nephews of a testator were legatees under his will and were also made executors. When one of them, after the reading of the will, attempted to take an inventory of the testator's properties, he was obstructed by the widow and he thereupon renounced his executorship in ignorance of the effect of such renunciation under section 141 of the Indian Succession Act.

*Held*, that the words of the section were very clear and the legatee lost the benefit under the will by his renunciation of the executorship. The section extends to any bequest and the contention that the legacy was made to the person in question not because he was an executor but because he was a much loved nephew cannot affect the application of the section.

*Held, further*, that nothing in the circumstances of the renunciation, as mentioned above, can be deemed a manifestation of an intention to act as an executor.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 30 of 1941.

*T. R. Venkatarama Sastri* and *S. Rajaraman* for Appellants.

*N. Rajagopala Aiyangar* for Respondents.

The Judgment of the Court was delivered by

*Wadsworth, J.*—This appeal raises a question of the interpretation of section 141 of the Indian Succession Act. The first appellant and his brother, who is not a party, were executors under the will of their uncle Rama Iyengar, who died on the 14th April, 1937. The will gives a substantial bequest of land to the first appellant, describing him as "my dearest nephew". The appointment of the two nephews as executors is in a separate clause of the will. The testator died in Madras. The will was in deposit with an advocate of Madura who is related to the parties. It was in a sealed envelope which was endorsed with a direction in the case of the death of the testator to deliver the document to Mr. T. S. Rajam, that is,

1. (1931) 61 M.L.J. 348 : I.L.R. 55 Mad. 17 ((F.B.).

* Appeal No. 399 of 1942. 19th January, 1944.

the first appellant, and Mr. T. S. Santanam or to either or survivor. It does not appear that any one knew of the precise contents of the will, though the first appellant claims that he knew that he was an executor and he suggests that the widow was also aware of this fact. The funeral was performed by the son-in-law of the testator, though the first appellant alleges that he made a payment of Rs. 50 on the day of the death towards the expenses. The will was got from Madura by the first appellant and read by P. W. 3 on the 26th April, 1937, in the presence of the relatives. The provisions of the will contemplated a prolonged administration, for the will would not eventually work itself out until certain minor children attained the age of 25.

There is some conflict regarding the events after the reading of the will. The evidence of Rao Bahadur K. V. Sesha Aiyangar, who is a maternal uncle of the first appellant and a prominent advocate of this Court, indicates that there was some dissatisfaction on the part of the widow with the provisions of the will and that very shortly afterwards the first appellant complained to the witness that he had met with difficulties and obstruction when he attempted to take an inventory of the assets. We see no reason to doubt the truth of Mr. Sesha Aiyangar's evidence and it seems to us unlikely that at that time the first appellant would have made such a report unless something of the kind had happened. We may take it that on the 27th, the day after the reading of the will, there was as the first appellant states, an attempt to take an inventory, which was abandoned on objection from the widow. We have it in the evidence of the first appellant himself that for three or four days thereafter he was considering what action he should take and then after considering all the circumstances he decided that he would renounce the executorship and allow letters of administration to be taken out. We also have it from the evidence of Mr. Sesha Aiyangar that when first appellant consulted him, nothing was said about the effect of section 141 of the Succession Act and that he himself was unacquainted with that section. We see no reason to disbelieve this evidence either. On the 5th June, 1937, a formal letter of renunciation was drafted by Mr. Sesha Aiyangar and it runs in the usual form except that it contains the words "We do not desire to be executors in the circumstances that have happened since the reading of the will." This phrase seems to refer to the trouble between the first appellant and the widow, though it may also have reference to the fact that there was a substantial suit filed by a Bombay creditor of the estate, which suit was compromised just before the signing of the letter of renunciation. We think it probable that the first appellant renounced the executorship in ignorance of the provision of law which threatened his legacy and with a desire to avoid family unpleasantness and possibly also with a desire to avoid the prolonged work in connection with the estate, he being an active business man.

On these facts the question is whether having regard to section 141 of the Succession Act, the first appellant has forfeited his legacy. Section 141 runs as follows :

> "If a legacy is bequeathed to a person who is named an executor of the will, he shall not take the legacy, unless he proves the will or otherwise manifests an intention to act as executor,"

and the illustration relates to the case of an executor who carries out the provisions of the will until the time when he dies a few days after the death of the testator in which circumstances he is held to have manifested an intention to act as executor. For the appellants Mr. T. R. Venkatarama Sastri has argued that section 141 must be read in the light of English decisions on the similar, but not identical, rule observed in the English Courts and that we should read into this section some proviso to the effect that the section shall operate if no contrary intention is expressed in the will, which would bring it into line with the English practice. We find ourselves unable to add such a proviso to this section however desirable it might be to qualify the section by words of that kind. The words of the section are very clear. We note that it says "bequeathed to a person who is named an executor" not "bequeathed to an executor." It is therefore impossible to contend that the prohibition applies only to cases in which the bequest is to an executor as such.

It clearly extends to any bequest, whatever be the reason for which it is made, provided that the legatee is named an executor. We are therefore of opinion that nothing in the terms of this will indicating that the testator made that bequest to the first appellant not because he was an executor but because he was a much loved nephew, can affect the application of the section.

The further question is whether in the circumstances recited above it can be said that the first appellant has otherwise manifested an intention to act as an executor. There may well be cases in which an executor has clearly shown an intention to act as such but has been prevented by some happening beyond his control from proving the will. Such cases would clearly fall within the meaning of the last words of this section. But all that we have in the present case is evidence that the executor, on the day after the will was read, went to the house of the deceased and announced his intention of taking an inventory and, as soon as objection was raised, he went away and after considering the matter for three or four days, he decided that he would have nothing more to do with the executorship in order to avoid unpleasantness to the family and possible trouble to himself. Thereafter a formal renunciation was made. We find it impossible to hold that such an inchoate act, followed practically as part of the same transaction by renunciation of the executorship can be deemed to be a manifestation of an intention to act as an executor.

In the result, therefore, the appeal is dismissed with costs.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Kewalram .. *Appellant**

*v.*

The Collector of Madras .. *Respondent.*

*Defence of India Rules (1939), rule 75-A—Requisitioning of house for residence of Collector of Madras—Power of Collector to order—Delegation of power by Central Government under section 2 (4) of the Defence of India Act (XXXV of 1939)—Scope—Defence of India Act (1939), sections 3, 15 and 16—Applicability—Limits of Court's jurisdiction.*

*Government of India Act (1935), section 292—Existence of Land Acquisition Act of 1894—No bar to power to requisition house under Defence of India Rules (1939), rule 75-A.*

*Government of India Act, (1935), section 205—Certificate under—Question involved should be substantial.*

Section 15 of the Defence of India Act (1939), stating that an authority or person acting in pursuance of the Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of British India, is directory and must be read in conjunction with section 16 which says that no order made in exercise of any power conferred by or under the Act shall be called in question in any Court. Of course this does not preclude the Court from deciding whether a power has been conferred or whether a power which has been conferred has been abused.

The Collector of Madras is in charge of supplies which are essential to the lives of the citizens of Madras and moreover he is the Deputy Civil Defence Commissioner. The provision of a house for his residence is something which is necessary for the " maintaining of supplies and services essential to the life of the community " within the meaning of rule 75-A of the Defence of India Rules.

There is full power of delegation under section 2 (4) of the Defence of India Act and when such power has been delegated the person or authority to whom the delegation has been made has all the powers of the Central Government unless the order of delegation contains some restriction on the exercise of the power. The order of delegation by notification dated 25th April, 1942, under which the Collector of Madras acted (in requisitioning a private bungalow for housing the incoming Collector) contained no restriction on his power to requisition houses in Madras. Under sub-section (4) of section 2 of the Defence of India Act, the power may be delegated so as to apply only in specified circumstances and under specified conditions but the delegation may be unrestricted. The power delegated by the order was a power to requisition for any of the purposes mentioned in rule 75-A, if the occasion should arise, subject to the property being within the jurisdiction of the Collector issuing the requisition order.

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* O. S. A. No. 7 of 1944. 2nd February, 1944.

The existence of the Land Acquisition Act is no bar to the power of the legislature to provide for requisitioning of property for any of the purposes mentioned in rule 75-A of the Defence of India Rules as the Land Acquisition Act relates to acquisition of absolute ownership when property is required for a public purpose or for a public company and not to requisitioning in an emergency.

Moreover section 3 of the Defence of India Act states that any rule made under section 2 and any order made under any such rule, shall have effect notwithstanding anything inconsistent therewith, contained in any enactment other than the Defence of India Act itself or any instrument having effect by virtue of any enactment other than the Act.

Accordingly the Collector of Madras had authority to issue an order requisitioning a house belonging to a private person for the purpose of housing the incoming Collector of Madras.

As there was nothing to show that the requisition order was in any way *mala fide* the order cannot be questioned in Court.

An application for a certificate under section 205 of the Government of India Act, 1935 on the ground that the question whether the legislature had power to requisition when the Land Acquisition Act (1894) remained unrepealed, involved an interpretation of the Constitution Act, section 292 was rejected on the ground that no such question of interpretation was involved and even if it did involve such interpretation the question was not a substantial one.

On appeal from the judgment and order of Bell, J., dated 23rd December, 1943 and passed in the exercise of the ordinary original civil jurisdiction of the High Court in Application No. 2670 of 1943.

*V. V. Srinivasa Ayyangar, N. R. Raghavachari* and *N. Srinivasa Ayyangar* for *N. T. Shamanna* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Ayyar*) instructed by the Crown Solicitor, for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—On the 21st August, 1943, the appellant purchased a house known as "Omar Bagh" in Nungambakkam, Madras. He acquired the property as a residence for himself and the members of his family. At the date of the purchase the house was in the occupation of Mr. P. Venkataramana Razu, Superintending Engineer, (A. R. P. and Aerodromes), Madras. It was inconvenient for Mr. Razu to move at once and he desired to remain in occupation until he could get a suitable residence elsewhere. We shall refer later in detail to what transpired between the date of the purchase by the appellant and the 18th December, 1943, when Mr. Razu vacated the house. For the moment it is sufficient to mention that on the 11th December, the Collector of Madras requisitioned the house under rule 75-A of the Rules framed under the Defence of India Act, 1939, for the residence of his successor. This order was served upon the appellant on the 15th December. Thereupon he interviewed the then Collector (Mr. Bhaskara Rao) and the Chief Secretary (Mr. G. W. Priestly) with the object of obtaining the cancellation of the requisition order. He was not successful and consequently on the 17th December, he filed in this Court an application under section 45 of the Specific Relief Act for an order quashing the order of requisition. The application was heard by Bell, J., during the Christmas vacation as the matter was one of urgency. The learned Judge held that the appellant had not made out a case for interference with the order and consequently dismissed the application. The appeal is from the judgment of the learned Judge. The appellant avers that the Collector had no power to issue the order of requisition and his learned counsel has advanced a number of reasons for this assertion. The appellant also says that even if the Collector possessed the power, the order issued by him amounted to an abuse of it.

Before the purchase of the house by the appellant it belonged to one Mr. D. D. Italia, who on the 4th August, 1943, no doubt at the request of the appellant, issued a notice to Mr. Razu to quit by the end of that month. At the time there was a great shortage of houses in Madras. This is so well known that the Court is justified in taking judicial notice of the fact. Having received the notice to quit, Mr. Razu wrote through an advocate of this Court, Mr. Rajaram to Mr. Italia's agent stating that it was impossible for him to comply with the demand that he should vacate the house by the end of August. He would make every endeavour to secure a suitable house and when he had done so he would vacate. He did not comply

with the notice and nothing further happened until the 20th September when Mr. Shamanna, the appellant's solicitor, wrote to Mr. Razu pointing out how his client was being inconvenienced by being kept out of the house which he had bought for his family residence. His wife and children had been brought from Hyderabad, Sind, to Madras and he had no other suitable residence for them. There was no reply to this letter. On the 14th October, Mr. Shamanna wrote to Mr. Razu pointing out that the appellant had shown every consideration for him, but he must vacate by the end of October, otherwise he would have to resort to legal proceedings. On the 16th October, Mr. Sundaram wrote again stating that his client was endeavouring to secure a suitable bungalow and would vacate as early as it was practicable for him to do so. Further correspondence of this nature passed between the lawyers of the appellant and Mr. Razu and the month of December found Mr. Razu still in occupation, although he had reiterated his intention to vacate as soon as he could find some other suitable house. On the 7th December, Mr. Sundaram wrote to Mr. Shamanna stating that Mr. Razu would vacate Omar Bagh by the 1st January, 1944. This letter was followed by a request made on behalf of the appellant that Mr. Razu should vacate by the 13th December and not at the end of the month. On the 13th December, Mr. Sundaram wrote to Mr. Shamanna stating that his client would be leaving the house on the evening of the 18th December and that he would give possession at 8-30 A.M. the next day. By this time the order of requisition had been issued. As we have already mentioned, it was served on the appellant on the 15th December.

Mr. Bhaskara Rao lived in the next house to Omar Bagh. On the 28th November, the Provincial Government notified his transfer to Guntur. It was not convenient for him to take his family with him to Guntur, as his sons were attending a school in Madras. Consequently it was arranged between him and Mr. Razu that Mr. Razu should vacate the house on the arrival of the new Collector, Mr. Day, on the 18th December and that Mr. Razu should take over the occupation of Mr. Bhaskara Rao's house. This was of great convenience to Mr. Bhaskara Rao. It ensured that his sons who had to remain in Madras would be looked after and that care would be taken of his furniture. It is no wonder that in these circumstances the appellant felt that he had been badly treated and the order of requisition had been issued as the result of some arrangement between Mr. Bhaskara Rao and Mr. Razu. The appellant was not, however, in possession of the full facts and when these are considered it cannot be said that the requisitioning of Omar Bagh was in any way *mala fide.* A house had to be found for the incoming Collector, and, of course, it was also necessary that Mr. Razu as the Superintending Engineer, A. R. P. and Aerodromes should have a house in Madras. On the 7th December, 1943, the Provincial Government passed a memorandum in which it stated that it had selected Omar Bagh for the residence of Mr. Day who had been posted as the Collector of Madras. The Collector of Madras was accordingly requested to requisition the building as soon as the then tenant vacated it in order that it might be ready for the occupation of Mr. Day on his arrival in Madras. This memorandum was issued under the signature of Mr. A. H. Southorn, Deputy Secretary to Government, Public (War) Department. It is in consequence of this communication that Mr. Bhaskara Rao as the Collector of Madras issued the order of requisition on the 11th December. In reply to the affidavit filed by the appellant in support of his application affidavits sworn by Mr. Southorn and Mr. Bhaskara Rao have been filed. In his affidavit Mr. Southorn states that the Collector of Madras is in charge of supplies essential for the City of Madras such as rice and firewood and is also the Deputy Civil Defence Commissioner. Mr. Razu as the Superintending Engineer, A. R. P. and Aerodromes, is employed in Madras solely on works necessary for the prosecution of the war. As no other suitable residence was available, he suggested to the Chief Secretary to the Government of Madras that the Government should requisition Omar Bagh. The affidavit proceeds :

"There is no question of Mr. P. Venkataramana Razu having prevailed on the Collector to requisition the building. The suggestion to commandeer the building, as already stated, originated

with me and there is no truth whatever in the allegation that the Collector of Madras in requisitioning the building was actuated by improper or malicious motives or that he exercised the power for any collateral or illegitimate purpose."

Mr. Bhaskara Rao in his affidavit states that the circumstances in which the order came to be made are accurately stated in Mr. Southorn's affidavit. As no other suitable house was available, he was satisfied that Omar Bagh was necessary for the purpose of accommodating the incoming Collector and therefore he passed the order.

Bell, J., fixed the hearing of the application for the 23rd December. The learned advocate for the appellant wrote to the Crown Solicitor stating that he required the attendance of Mr. Southorn and Mr. Bhaskara Rao for the purpose of cross-examining them on their affidavits. They attended in response to this notice, but the learned advocate did not cross-examine them. The explanation of his failure to do so is that the case was being heard during the vacation and that he had other matters to attend to. We cannot accept this as a legitimate reason for his decision not to exercise his right of cross-examination and as they were not cross-examined, the Court must accept their statements without qualification. The affidavits which go unchallenged completely dispose of the allegation that Mr. Bhaskara Rao acted in abuse of his powers as the Collector of Madras.

The contentions of law advanced by Mr. V. V. Srinivasa Ayyangar are six in number, and are these :

(1) the requisitioning of the house was contrary to the provisions of section 15 of the Defence of India Act, 1939 ;

(2) the requisitioning of a house for the incoming Collector was not an act contemplated by rule 75-A of the rules framed under the Act ;

(3) rule 75-A required the Central Government to be of the opinion that the requisitioning was necessary or expedient and the power of delegation conferred by section 2 (4) did not operate to give the delegated authority the right of forming the opinion ;

(4) there had in any event been no lawful delegation because the provisions of section 2 (4) had not been complied with ;

(5) if the power of forming the opinion could be delegated, the opinion must be that of the Collector and not that of Mr. Southorn ; and

(6) inasmuch as the Land Acquisition Act, 1894, had not been repealed, there could be no power of requisition under the Defence of India Act.

Section 15 of the Defence of India Act states that an authority or person acting in pursuance of the Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of British India. This section is directory and must be read in conjunction with section 16 which says that no order made in exercise of any power conferred by or under the Act shall be called in question in any Court. Of course this does not preclude the Court from deciding whether a power has been conferred or whether a power which has been conferred has been abused. We have said sufficient to indicate that here there has been no abuse of power. The appellant in his affidavit says that there were other houses available, but no attempt has been made to prove that at the time of requisition there was vacant any other house suitable for the residence of the Collector. In view of the statements made in the affidavits of Mr. Southorn and Mr. Bhaskara Rao it must be taken that there was no other suitable house available. This disposes of the first point. Rule 75-A (1) reads as follows :

"If in the opinion of the Central Government or the Provincial Government it is necessary or expedient so to do for securing the defence of British India, public safety, the maintenance of public order or the efficient prosecution of the War, or for maintaining supplies and services essential to the life of the community, that Government may by order in writing requisition any property, movable or immovable, and may make such further orders as appear to that Government to be necessary or

expedient in connection with the requisitioning : Provided that no property used for the purpose of religious worship and no such property as is referred to in rule 66 or in rule 72 shall be requisitioned under this rule."

Mr. Srinivasa Ayyangar says that the requisitioning of a house for the Collector cannot be deemed to be an act done for the purpose of maintaining supplies or services essential to the life of the community. We do not agree . The Collector is in charge of supplies which are essential to the lives of the citizens of Madras and moreover he is the Deputy Civil Defence Commissioner. He cannot carry out these important duties efficiently without a suitable residence in Madras. Therefore the provision of a house is something which is necessary for the maintaining of supplies and services essential to the life of the community. Section 2 (4) says :

" The Central Government may by order direct that any power or duty which by rule under sub-section (1) is conferred or imposed upon the Central Government shall in such circumstances and under such conditions, if any, as may be specified in the direction be exercised or discharged—

(*a*) by any officer or authority subordinate to the Central Government, or

(*b*) whether or not the power or duty relates to a matter with respect to which a Provincial Legislature has power to make laws, by any Provincial Government or by any officer or authority subordinate to such Government, or

(*c*) by any other authority."

There is here full power of delegation, but Mr. Srinivasa Ayyangar suggests that rule 75-A requires the Central Government to form its own opinion on the question of the necessity for requisition and then direct the subordinate authority to issue the order of requisition under the delegated power. This is reading into the Act and the rules something which is certainly not there. When a power has been delegated under section 2 (4) the person or authority to whom the delegation has been made has all the power of the Central Government unless the order of delegation contains some restriction on the exercise of the power. The order of delegation under which the Collector acted contained no restriction on his power to requisition houses in Madras.

There is no more substance in the fourth contention, which is that there has been no lawful delegation because the order of delegation does not specify the circumstances under which the Collector is to exercise the power. The order of delegation was passed on the 25th April, 1942. It states that " in exercise of the powers conferred by sub-section (4) of section 2 of the Defence of India Act, 1939 (XXXV of 1939), the Central Government is pleased to direct that, with effect from 16th May, 1942, the powers conferred on it by rule 75-A of the Defence of India Rules shall be exercisable also by the authorities specified in the first column of the schedule hereto annexed in respect of the classes of property, and subject to the conditions, if any, specified in the second column of the said schedule." All Collectors are included in the authorities specified in the first column. Their powers of requisition are restricted to the properties within their respective districts. Mr. Srinivasa Ayyangar points to the words " in such circumstances and under such conditions, if any, as may be specified," which appear in sub-section (4) of section 2, and says, that the words " if any " only apply to " conditions " and not to " circumstances." This is not so. The power may be delegated so as to apply only in specified circumstances and under specified conditions but the delegation may be unrestricted. The power which was here delegated was the power to requisition for any of the purposes mentioned in rule 75-A if the occasion should arise, subject to the property being within the jurisdiction of the Collector issuing the requisition order.

The fifth argument is based on the suggestion that Mr. Bhaskara Rao acted not on his own opinion, but merely on the opinion formed by Mr. Southorn. The difficulties of the situation with regard to houses had been brought to the notice of the Provincial Government and Mr. Southorn as the Deputy Secretary concerned in this matter communicated the wishes of the Provincial Government to the Collector, but the Collector formed his own opinion. His order states :

"Whereas, I, T. Bhaskara Rao, Esq., I.C.S., Collector of Madras, am of the opinion that it is necessary to requisition the building specified in the schedule annexed hereto for maintaining supplies and services essential to the life of the community;

Now, therefore, in exercise of the powers conferred by rule 75-A of the Defence of India Rules which have been delegated to me in the Government of India, Defence Co-ordination Department Notification No. 1336 OR./1/42, dated the 25th April, 1942, I hereby requisition the said building and order . . . . ."

In his unchallenged affidavit Mr. Bhaskara Rao said that he was satisfied that the requisitioning of the house was necessary for accommodating the incoming Collector. Therefore it cannot with reason be said that Mr. Bhaskara Rao merely acted at the behest of the Provincial Government without applying his mind to the situation.

The last contention, namely, that there is no power in the Legislature to provide for requisitioning property for any of the purposes mentioned in rule 75-A so long as the Land Acquisition Act remains on the statute is an astonishing one. The Land Acquisition Act relates to the acquisition of property, that is the acquisition of absolute ownership when property is required for a public purpose or for a public company. To say that the Legislature has no power in a national emergency to requisition property without acquiring it under the Land Acquisition Act has only to be stated to be rejected. Moreover, section 3 of the Defence of India Act states that any rule made under section 2 and any order made under any such rule, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than the Act.

For the reasons given we hold that the Collector of Madras had authority to issue the order of the 11th December, 1943, requisitioning the appellant's house and that the power was lawfully exercised. Consequently the appeal must be dismissed with costs.

[On an application for a certificate under section 205 of the Government of India Act, 1935, the Court made the following]

ORDER: Mr. Srinivasa Ayyangar has applied for a certificate under section 205 of the Government of India Act, 1935, on the ground that his argument with regard to the Land Acquisition Act, 1894, involves a substantial question of law as to the interpretation of the Government of India Act, 1935. He points to section 292 of the Government of India Act which provides for the continuance of the existing laws until altered or repealed by a competent Legislature or other competent authority. The Land Acquisition Act has not been repealed, but this does not prevent the Legislature passing the Defence of India Act, and there is difference between requisition and acquisition. We have already described the contention that the Land Acquisition Act stands in the way of requisition under the Defence of India Act as an astonishing one and having heard the learned Advocate-General we are satisfied that the question is not one of the interpretation of the Government of India Act, 1935, but even if it did involve the interpretation of section 292, the question is not a substantial one.

The certificate must be refused.

K. S. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

W. Srinivasavaradachariar, having died, his son and legal representative, W. Krishnamachari .. *Appellant**

*v.*

Dasu Reddiar *alias* Veeraswami Reddiar and others .. *Respondents.*

*Transfer of Property Act (IV of 1882), section 55—Portion of purchase price left with the vendee to be applied for discharging a mortgage debt due by the vendor—Failure of vendee to discharge the mortgage—Right of vendor to recover the amount not so applied.*

Where under a contract of sale of land the vendee retains in his hands money sufficient to discharge an encumbrance on the property sold to him, he acts as the agent of the vendor as regards the disposal of the sum so retained, although the agency is one which cannot be revoked as the vendee has himself an interest in the money being applied in the manner indicated. Consequently if the vendee failed to apply a portion of the money so retained for payment of a mortgage debt due by the vendor, the vendor is entitled to recover that amount.

Appeal against the decree of the Court of the Subordinate Judge, Chingleput, in O. S. No. 38 of 1940.

*V. C. Viraraghavan* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Ayyar*), *R. Viswanathan, T. R. Srinivasan, T. E. Ramabhadrachari* and *K. Narasimha Ayyar* for Respondents.

The Judgment of the Court was delivered by

*The Chief Justice.*—The appellant's father sued in the Court of the Subordinate Judge of Chingleput to recover the sum of Rs. 2,30,000, the amount of the damages which he alleged he had suffered as a result of the first respondent's default in fulfilling his obligations under a contract for the sale of land, and in the alternative, for the recovery of Rs. 27,500 on the basis that there had been failure of consideration to this extent. The plaintiff died during the pendency of the suit, which was continued by the appellant. The Subordinate Judge held that the first defendant was in default and that a suit in damages lay, but he found that no loss had in fact been sustained by the plaintiff. He rejected in its entirety the alternative claim.

On the 14th December, 1923, the plaintiff agreed to sell for the sum of Rs. 82,750 his rights in the shrotriem villages of Koduvur and Seekananankuppam. The plaintiff's son was a party to the agreement. The agreement provided that the purchaser should pay to the vendor by the 14th January, 1924, a sum of Rs. 9,000 and a further sum of Rs. 5,000 within ten days from the date of the registration of the conveyance. The purchaser was to retain the balance of the consideration for the purpose of discharging the plaintiff's liabilities to his creditors. The agreement did not set out a list of the debts, but these were detailed in a letter written on the 10th January, 1924, by the plaintiff to the first defendant. The liabilities amounted to Rs. 68,689, of which Rs. 29,289 was then due to one A. N. Rangaswami Ayyangar, to whom the plaintiff had mortgaged his rights in these two villages as well as his rights in the village of Vedavakkam and a house which he owned at Conjeevaram. The letter contained a demand for the fulfilment of the contract of the 14th December, 1923.

The plaintiff and his son failed to execute the conveyance of the properties sold to the first defendant, who instituted a suit (O. S. No. 1 of 1924 in the Court of the Subordinate Judge of Chingleput) for a decree for specific performance. This resulted in a compromise decree being passed on the 29th April, 1924. The decree provided that the consideration for the sale was still to be the sum of Rs. 82,750, but made certain changes in the contract. The first defendant was to pay to the plaintiff and his son the sum of Rs. 12,500 on or before the 2nd May, 1924, and

* Appeal No. 37 of 1942. 26th January, 1944.

Rs. 11,500 before the 10th June, 1924. He was to retain the balance of the money in his hands for the purpose of paying off the creditors, who were named and their debts specified. The sum retained was more than sufficient to pay off all the creditors. The excess was Rs. 7,250.

Clause (*g*) of paragraph 2 of the decree related to the payment to be made to Rangaswami Ayyangar and as this provision is of special importance we will set it out in full :

"That as the suit properties and the other properties belonging to the defendants have been mortgaged to Mr. A. N. Rangaswami Ayyangar residing at Trivellore the plaintiff shall, for the purpose (of payment) to the aforesaid mortgagee retain with him a sum of Rs. 27,500 (RupeesTwenty-seven thousand and five hundred) from the sale amount. If it is found that an amount in excess of the sum so retained has to be paid to the aforesaid Rangaswami Ayyangar on 14th December, 1923, the date of the suit agreement, the defendants shall without reference to the plaintiff pay such amount; if default is made (in such payment) and any loss should occur to the plaintiff thereby the defendants should make good the same. If the plaintiff does not pay the amount so retained and if loss should occur to the defendants (thereby) the plaintiff shall make good such (loss) to the defendants ; that if the defendants have to pay a lesser amount to the aforesaid Rangaswami Ayyangar than the amount so retained and mentioned above the plaintiff shall pay to the defendants such difference (of the amount)."

The decree further provided that the conveyance should be to the first defendant or at his option to him and the second defendant.

On the 22nd March, 1926, on the directions of the first defendant, the plaintiff and his son conveyed the Koduvur properties to the first defendant and the Seekanankuppam properties to the second defendant. The consideration for the conveyance to the second defendant was stated to be the sum of Rs. 32,000 and it is common ground that the second defendant discharged to this extent the plaintiff's liabilities. The first defendant fulfilled his obligations, except in respect of the debt due to Rangaswami Ayyangar. Only the sum of Rs. 8,000 was paid to Rangaswami Ayyangar and this came out of the moneys provided by the second defendant.

On the 31st July, 1933, Rangaswami Ayyangar filed a suit (O. S. No. 39 of 1933) to enforce his mortgage and on the 5th December, 1934, he obtained a decree for Rs. 52,691-2-9. The difference between this sum and the Rs. 29,289 represented the accumulation of interest. In execution of the decree the properties mortgaged were sold on the 18th November, 1936. The Koduvur properties were purchased by the fourth defendant for Rs. 10,502. He also bought the Seekanankuppam properties. The price paid for these properties was Rs. 16,500 : The decree-holder bought in the Vedavakkam properties for the sum of Rs. 7,501 and the Conjeevaram house for Rs. 3,001. The total amount realised by the sale was Rs. 37,504.

It was in these circumstances that the plaintiff instituted the suit which has given rise to this appeal. Numerous issues were raised in the trial Court ; but in this Court the questions have been confined to (1) whether the plaintiff is entitled to recover from the first defendant Rs. 19,500, the amount which he failed to pay to Rangaswami Ayyangar, (2) whether he is entitled in the alternative to damages for the first defendant's default, and (3) whether the suit is barred by the law of limitation. The plea that the plaintiff is entitled to the Rs. 19,500 has been advanced first in this Court, as it is now conceded that if his claim is to be one in damages, the decree will be for a smaller sum.

As we have already indicated, the first defendant retained in his hands more than sufficient to pay off all the creditors and he had no excuse for failing to pay Rangaswami Ayyangar the amount due to him. He could not, of course, be compelled to refund to the plaintiff this part of the purchase consideration while Rangaswami Ayyangar's mortgage on the Koduvur and Seekanankuppam properties remained outstanding, but it is no longer outstanding as the properties have been sold under the decree obtained by the mortgagee. The first defendant is not now in a position to make a payment to Rangaswami Ayyangar and consequently the plaintiff says that there has been a failure of consideration to the extent of

Rs. 19,500, the difference between the Rs. 27,500 which the first defendant had to pay to the mortgagee under the compromise decree and the Rs. 8,000 which was paid to him on account.

The rights and liabilities of the vendor and vendee in a sale of immovable property are, in the absence of a contract to the contrary, regulated by the provisions of section 55 of the Transfer of Property Act. In *Naima Khatun* v. *Sardar Basant Singh*[1], a Full Bench of the Allahabad High Court pointed out that where property has been transferred by a vendor to a vendee and there is a direction to the vendee to pay off a third person, the transaction may be one of any of the following characters :

"(1) The amount left in the hands of the vendee may be a part of the purchase money remaining unpaid, in which case it is obviously money belonging to the vendor and if not paid as directed is still due to be paid to the vendor ; or

(2) it may amount to a covenant with an undertaking to relieve the vendor from his existing liability, in which case a suit on the covenant may lie ; or

(3) it may be a mere promise to perform an act for consideration, or a contract of indemnity, in which case a suit for damages incurred on the breach of the contract would lie under section 125 of the Contract Act ; but it must be proved that loss has been sustained."

The plaintiff says that the case falls within the first category. On the other hand the contesting defendant says that it falls within the third category. On the contract embodied in the compromise decree we consider that the plaintiff's contention must prevail.

In *Raghunathachariar* v. *Sadagopachariar*[2], a Bench of this Court held that where a person transfers immovable property to another in consideration of the transferee agreeing to pay debts due by the transferor to third persons, the transferor is entitled to sue the transferee for the recovery of those sums which the transferee has failed to pay to the third persons within a reasonable time and he is not bound to show that he has been damnified in any way by the transferee's failure. In that case the transferee had not undertaken to discharge secured debts, but in our opinion the same principle must apply, subject to the proviso that where the debt to be paid off by the transferee is secured by a mortgage the transferor cannot compel him to make a refund while the mortgage is outstanding.

In *Rama Rachayan Singh Thakur* v. *Raghunath Prasad Misser*[3], the Patna High Court had to consider the case where a vendee had failed to discharge a mortgage which it was his duty to pay off out of the consideration retained by him and it was held that the vendor was entitled to recover the amount notwithstanding that the mortgage had been discharged by a third party. In that case the plaintiff transferred to the defendant immovable property in consideration of the defendant agreeing to apply a portion of the purchase money for payment of a mortgage debt due by the vendor. The purchaser failed to discharge this debt, but the plaintiff's brother did so. It was also held that the vendor was entitled to recover the amount of the unpaid purchase money without any obligation to show that he had been damnified by the vendee's default.

In delivering the judgment of this Court in *Subba Rao* v. *Varadiah*[4], Patanjali Sastri, J., pointed out that where the vendee retains in his hands money to discharge an encumbrance on the property sold to him he acts as the agent of the vendor as regards the disposal of the sum retained, although the agency is one which cannot be revoked as the vendee has himself an interest in the money being applied in the manner indicated. Consequently, where the immovable property is sold free from incumbrances, the vendor is entitled to call upon the vendee to account to him for any portion of the purchase money which events have shown is not required for the fulfilment of the stipulation. In the present case the property was sold free from incumbrances and these observations have application here.

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1. (1933) I.L.R. 56 All. 766 (F.B.).
2. (1911) 21 M.L.J. 983 : I.L.R. 36 Mad. 348.
3. (1929) I.L.R. 8 Pat. 860.
4. (1943) 1 M.L.J. 279 : I.L.R. (1943) Mad. 885.

We consider that there is ample authority for the plaintiff's proposition that he is entitled to recover from the first defendant the Rs. 19,500. Under the contract the first defendant was bound to pay this money to Rangaswami Ayyangar. As he failed in his duty he cannot be allowed to retain it in his hands. Consequently, we hold that the plaintiff is entitled to a decree for the sum of Rs. 19,500, with interest from the date of the sale held in execution of the decree passed in O. S. No. 39 of 1933, namely, the 18th November, 1936.

As this case may be carried further we will deal with the plaintiff's alternative claim for damages. It is conceded on behalf of the first defendant that he is bound to make good any loss which the plaintiff may have suffered as the result of the first defendant's default; but it is said that the Subordinate Judge was right in holding that no loss had in fact been suffered. The finding of the Subordinate Judge that the plaintiff had not been damnified is based on the opinion that there was no value left in the equity of redemption, the amount due to Rangaswami Ayyangar under his mortgage being far in excess of the value of the property. This ignores the fact that as a result of the first defendant's default the plaintiff lost his rights in the village of Vedavakkam and his ownership of the house in Conjeevaram. If the first defendant had fulfilled his obligations under the compromise decree these properties would not have been lost to the plaintiff as on the date of conveyance the first defendant had more than sufficient in his hands to pay off the mortgage in full. The value of these two properties is Rs. 10,502, the aggregate price which was realised for them at the Court auction. If the plaintiff were not entitled to recover the Rs. 19,500 admittedly he would be entitled to recover Rs. 10,502 with interest from the date of the plaint, the 3rd March, 1937, but as we hold that his first claim is well founded, he will have a decree against the first defendant for the larger amount with interest.

There is no substance in the plea that the suit was barred by the law of limitation. The plaintiff's right of suit against the first defendant arose on the 18th November, 1936, when Rangaswami Ayyangar executed his decree. The suit was filed within twelve months of that date.

The plaintiff will have his costs here and below on the sum of Rs. 19,500 as against the first defendant. The plaintiff has sued *in forma pauperis* and the first defendant must pay the court-fee to Government on this amount. The balance of the court-fee will be paid by the plaintiff.

The appeal will stand dismissed as against the other respondents with costs, one set to be divided proportionately.

K.S. ——— *Appeal allowed against 1st defendant.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

K. Kuttan Unni *alias* Elaya Nair and others .. *Appellants**

*v.*

K. Kochunni *alias* Moopil Nair .. *Respondent.*

*Malabar Law—Tarwad—Properties held by head of tarwad—Presumption—Stanom properties—Burden of proof—Properties acquired with income of stanom properties—Intention to keep separate.*

In the case of properties held by the head of a *tarwad* the presumption is that they are *tarwad* properties. The question whether there is a *stanom* in any particular case must be decided upon the evidence of usage adduced and the onus is upon those who assert that any particular property belongs to an individual and not to the family to which the individual belongs to prove the same. It is not sufficient in order to create a *stanom* that properties are temporarily allotted to a person filling any particular position. The evidence must be sufficient to prove a long continued usage recognising the property in question as belonging to the person filling a particular position without any interest in the members of the family to which the person holding the position belongs and without any power in them to terminate the arrangement. Further the person who

* Appeal No. 259 of 1938. 9th April, 1943.

alleges the same must show that properties which have been purchased out of the income of *stanom* properties have remained *stanom* in character.

*Parakkal Kondi Menon* v. *Vadakantil Kunhi Penna,* (1864) 2 M.H.C.R. 41 and *Appunni* v. *Velluthadatha Shamu,* (1871) 6 M.H.C.R. 401, referred to.

Appeal against the decree of the Court of the Subordinate Judge, Ottapalam in O. S. No. 46 of 1934.

*B. Sitarama Rao, P. Govinda Menon, D. H. Nambudiripad* and *P. Chandrasekara Menon* for Appellants.

*T. R. Venkatarama Sastri* and *K. Subba Rao* for Respondent.

The Court delivered the following

JUDGMENT.—The parties to this appeal are members of a Malabar *tarwad.* The appellants, who are the junior members, sued the respondent, who is the senior member, in the Court of the Subordinate Judge of Ottapalam for a declaration that the properties in his possession belong to the *tarwad* and that he is merely in charge of them as the *karnavan* of the family. The properties are extensive and produce a large annual income. The respondent pleaded that they belong to *stanoms* of which he is the *stani* and therefore the appellants were not entitled to the declaration asked for, although he admitted that they were entitled to be maintained out of the properties in his possession. The Subordinate Judge found for the respondent, and accordingly dismissed the suit. The appeal is from this decision.

The relationship between the parties is shown by the following geneological tree :

Parvathi Nethiyar (d. 1904).

- son (d. 1894).
- Narayani Nethiyar 5th plff.
  - Kunhikuttanunni Nair 2nd plff.
  - Appunni Nair, 10th plff.
  - Rajanunni Nair 3rd plff.
  - Sathyabalanunni Nair (d. 5th plff.).
- Appukutanunni Moopil Nair (d. 1925.)
- Kochunni Moopil Nair 1st deft.
- Meenakshi Netthiyar 6th plff.
  - Kochunni Nair, 11th plff.
  - Parvathi *alias* Vijayam Nethiyar, 7th plff.
    - Sathyanathanunni (minor) 9th plff.
  - Appukuttanunni (minor) 8th plff.
- Kuttanunni Elaya Nair, 1st plff.

A *tarwad* is an undivided family governed by the Marumakkattayam law, the customary law of Malabar. Its outstanding feature is that for the purpose of inheritance descent is traced through the female line. The property of the family is managed by the *karnavan* who is ordinarily the eldest male member. Before the passing of the Marumakkattayam Act, 1932, a member of a *tarwad* could not insist on a partition. A partition could only take place if all the adult members agreed. Before the passing of the Act the rights of members junior to the *karnavan* were merely these : (1) to succeed to the management ; (2) to be maintained by the *karnavan* ; (3) to object to improper administration of the property of the *tarwad* and to see that the property was duly conserved for the use of the tarwad; (4) to bar an adoption ; and (5) to get each a share should a partition take place. This summary is taken from the treatise of the late Mr. P. R. Sundara Ayyar on "Malabar and Aliyasanthana Law." Mr. Sundara Ayyar was a Judge of this Court from 1911 to 1913 and his work is recognised as being authoritative.

The Madras Marummakkattayam Act, 1932, has made important changes in the customary law, but it is not necessary to enter upon a detailed survey. It will be sufficient for the purposes of this case to refer to sections 32, 38, 43 and 44. Section 32 requires the *karnavan* to keep true and correct accounts of the income and expenditure of the *tarwad* and provides that the accounts shall be made available over a year for inspection by the major *anandravans* (members of a *tarwad* other than the

*karnavan*). Section 38 makes provision for partition of *tarwad* property subject to limitations which do not call for mention here. Section 43 permits two-thirds of the adult members of the *tarwad* to apply to the Collector for the registration of the *tarwad* as impartible and authorises the Collector, if satisfied that the petition is in order to register the *tarwad* as impartible. Section 44 allows two-thirds of the adult members of a *tarwad* registered as impartible to apply for the cancellation of the registration. The appellants applied for the registration of the *tarwad* under section 43 and their action was resented by the respondent.

The word " *stanom* " according to Sundara Ayyar means the status and attendant property of senior rajas. In Moore's "Malabar Law and Custom " it is defined as a station, rank or dignity, and the definition in Wilson's " Glossary of India " is to the same effect. A *stani* is the holder of a *stanom.* The ancient rulers of the Malabar coast possessed *stanoms* and it may be taken that the lands which they held as rulers were regarded as being *stanom* in character. Rulers granted *stanoms* to their subsidiary chieftains and public officers. The grant of a *stanom* to a subsidiary ruler or public officer was usually accompanied by a grant of land for the maintenance of the dignity. In Mr. Sundara Ayyar's work a chapter is devoted to this subject and it is there pointed out that in addition to the families of princes and chieftains there were other families possessing *stanoms* without any particular dignity attaching to them. In ancient days when a family became opulent and influential the members of the *tarwad* sometimes agreed to set aside for the *karnavan* certain property in order that he might keep up his social position and influence and this property descended to the next head of the family. What was permissible in ancient days is not, however, permissible in these days. In *Appunni* v. *Velluthadatha Shamu*[1], this Court held that a *tarwad* cannot now create a *stanom.*

It is an accepted rule that where there are properties attached to a *stanom*, the *stani* has the right to utilise the income for his own purposes, and the members of the *tarwad* are not entitled to claim maintenance out of such income. In the present case, the respondent says that he is bound to maintain the members of the *tarwad* out of the income from what he claims to be *stanom* properties, but Mr. T. R. Venkatarama Sastriar, who appears for him, has not referred to any other case where the members of a *tarwad* have the right to claim to be maintained out of *stanom* properties. We consider that the respondent has made this assertion in an attempt to avoid the conclusions to be drawn from the judgments in two cases decided in 1818 to which reference will be made presently.

It is also common ground that properties acquired by a *stani* out of the income of the *stanom* properties become on his death the properties of the *kovilagam* in which he was born, unless he has disposed of them or has shown an intention to attach them to the *stanom.* A *kovilagam* is a family residence of a ruler wherein junior members of a branch of the family live under the management of the eldest resident female of that particular branch—*See* Moore's " Malabar Law and Custom", 3rd edition, page 355. In the family of which the parties are members there is only one *kovilagam.*

In 1792 Tippu ceded Malabar to the East India Company and ever since it has been under the rule of the Government of India. On the secession, the ruling powers of the rajahs and the chieftains were taken away from them. They were not deprived of the possession of their landed properties, but they were compelled to pay land revenue in respect of them and consequently became mere holders of land held under *ryotwari* tenure. Upto 1806, the deposed rulers were allowed to collect the land revenue and retain for themselves one-fifth of the net income, but in that year the East India Company itself undertook the collection and thereafter the Government granted to the deposed rulers annual allowances (*malikhana*) for the maintenance of themselves and their families. The *malikhana* was liable to forfeiture on proof of disloyalty or misconduct. In his "Collection of Treaties, Engagements and Sanads", Volume X, page 178, Aitchison points out that *malikhana* holders, are in no sense zamindars. Zamindars are found on the

1. (1871) 6 M. H. C. R. 401.

east coast of South India, not on the west coast, and this is to be borne in mind. The only ruler with whom the East India Company entered into an agreement in writing in respect of the payment of *malikhana* was the Zamorin (The Rajah of Calicut). This agreement is set out in full at pages 247 to 250 of Volume X of Aitchison's "Collection of Treaties, Engagements and Sanads", and is also reproduced on Logan's "Collection of Treaties and other papers of importance," 2nd edition, pages 372 to 376. It is not disputed that *malikhana* allowances were granted to all the deposed rulers on the same basis. While the rajah or chieftain and his successors might continue to regard lands formerly held by him as a ruler as still being *stanom* lands he and they were, so far as the Government was concerned, merely holders of such lands under *ryotwari* tenure.

The head of the family of which the parties are members was a ruling chieftain in 1792, although his state, Kavalappara, situate in what is now known as the Waluvanad Taluk, was a small one. An idea of its size in relation to other states in Malabar is to be gathered from the map to be found at page 44 of "The Malabar Gazetteer." Mr. Sundara Ayyar does not include the Kavalappara rajah in his list of ruling princes given at page 52 of his work, because that list was confined to the principal members of that class, but there can be no doubt that the head of the Kavalappara family was a ruling chieftain in 1792, because in 1806, the East India Company granted to the family a *malikhana* of Rs. 4,567-10-3.

While the origin of the state is not really known, it may be taken that at one time the chieftain of Kavalappara was subordinate to the Rajah of Palghat because the latter bestowed upon him the following *stanoms* in the Palghat taluk :

(1) Kanhumal Pada Nayar with the *stanom* name of Ittunni Kumaran Raman.

(2) Pannithiruthi Kymal with the *stanom* name of Ittunni Kumaran Raman.

(3) Chundil Muthar with the *stanom* name of Kotha Kumaran Raman.

(4) Kattisseri Kymal with the *stanom* name of Kauthillath Ittunni Kumaran Raman.

(5) Pazhambalakode Muthar with the *stanom* name of Kumaran Raman *alias* Pazhambalakode Muthar.

He also possessed two *stanoms* in Cochin territory. The *stanom* name of Kavalappara chieftain so far as his own state was concerned was "Karakkat Kumaran Raman."

The plaintiffs allege that these stanoms never had lands attached to them but the documents exhibited anterior in date to 1792 provide strong indication to the contrary and we accept the defendant's case that originally the *stanoms* granted by the Palghat and Cochin rulers were endowed with lands and that the head of the family held the lands of the Kavalappara state itself entirely in his own right. Whether the state lands and the lands which formed the endowments of these *stanoms* were treated as *tarwad* properties after the ruling powers were taken away and the *malikhana* granted instead is another matter. This is the main question which the Court is called upon to decide in this appeal.

The Subordinate Judge's reasons for holding that the properties in suit are *stanom* properties are broadly these : (1) At the time of the cession of Malabar the Kavalappara Nayar was an independent chieftain ; (2) the presumption in the case of rulers is in favour of the impartible nature of their possessions ; (3) other Malabar rulers possessed *stanom* properties ; (4) the description of the head of the family in documents relating to property is consistent with a *stanom* character; (5) some of the ceremonies performed by the *quondam* rulers are still performed ; and (6) the maintenance of the members of the family out of properties held by the head of the family is not inconsistent with his position as a *stani* successor of the ruling chieftain of 1792.

What were the habits and customs of the rulers in Malabar prior to 1792 is not of great importance when considering what is the position 150 years later. Ceremonies and customs may continue, but whether property rights remain the same is a very different matter. The only safe guide in deciding whether rights in property are the same as those held a century and a half ago is to ascertain what

has been the course of events since. We propose to examine the course of events since 1792, but before doing so it may be pointed out that the respondent's claim that the whole of the properties in his possession belong to *stanoms* is obviously fallacious. In fact, Mr. Venkatarama Sastriar has conceded this. Some of the lands now in his possession were in the dim past set apart for the maintenance of the Amma Nethiyar (the senior lady of the family) and the junior members of the *kovilagam*. Ex. XII is a receipt given by the Village Munsiff to the agent of the senior lady of the family for revenue paid by her. The document is torn and it does not disclose the year, but it is not disputed that it was given in the first quarter of the last century. Ex. XIII is a patta granted to the Amma Nethiyar by the East India Company and the date appears as the 27th April, 1842. Then there is Ex. XV, a *patta* granted to the Kavalappara Muppil Nayar by the Government on the 2nd January, 1869. The word "Muppil" means "senior" and the designation "Kavalappara Muppil Nayar" is not a *stanom* title. This grant is just as consistent with it being a grant to the head of the family as the *karnavan* of the *tarwad* as being a grant to him as a *stani*; if anything the indication is more in favour of it being a grant to him as the *karnavan*.

The plaintiffs have not filed a list of the properties which they say the respondent holds as the *karnavan*. As we have indicated, it is their case that all the properties held by him are held as the *karnavan*. Before the trial commenced the respondent urged that the plaintiffs should specify the properties which they alleged belonged to the *tarwad*. It was held that it was not necessary for them to do so. Their case was that everything held by the respondent belonged to the *tarwad*. It is not without significance that the respondent has himself not attempted to identify any of the properties in his possession with the *stanoms* of the family.

In the case of properties held by the head of a *tarwad* the presumption is that they are *tarwad* properties. Mr. Sundara Ayyar at page 256 of his work expresses the opinion that the question whether there is a *stanom* in any particular case must be decided upon the evidence of usage adduced, and the onus is upon those who assert that any particular property belongs to an individual and not to the family to which the individual belongs. He goes on to say that it is not sufficient in order to create a *stanom* that properties are temporarily allotted to a person filling any particular position. The evidence must be sufficient to prove a long continued usage recognising the property in question as belonging to the person filling a particular position without any interest in the members of the family to which the person holding the position belongs and without any power in them to terminate the arrangement. In this connection he relies on the decisions of this Court in *Parakkal Kondi Menon* v. *Vadakantil Kunhi Penna*[1], and *Appunni* v. *Velluthadatha Shamu*[2] We are in agreement with this opinion. Further, the respondent must show that properties which have been purchased out of the income of *stanom* properties have remained *stanom* in character, but he has made no attempt to prove this.

With these preliminary observations we will now proceed to refer to the principal events in this family since the early part of the last century. In 1817, Valia Kava Nethiyar, the mother of the third Nayar, who was then a child of 7 or 8 years, instituted a suit on behalf of herself and another suit on behalf of her son claiming maintenance from the then Muppil Nayar. The defence was that the mother was only entitled to maintenance out of the properties which were in the possession of the Amma Nethiyar and the same applied to the son until he became of age. The properties in the possession of the Amma Nethiyar had, the defendant said, been set aside for the maintenance of the ladies and the children of the *tarwad*. The mother had left the house where the Amma Nethiyar resided, taking her child with her, and the Muppil Nayar resented her action. The judgments in these suits have been exhibited. The Court held that the plaintiffs were entitled to be maintained out of the properties in the possession of the defendant and a decree was passed against him in each suit. In the mother's suit, the defendant's own

1. (1864) 2 M.H.C.R. 41.    2. (1871) 6 M.H.C.R. 401.

witnesses stated that if the ladies lived separate on being compelled to do so as the result of family dissensions, the defendant, whom they described as the *karnavan*, should maintain them. These judgments have a very important bearing on this case. The defendant there could not be compelled to maintain the plaintiffs out of *stanom* properties and notwithstanding that certain properties were in the possession of the Amma Nethiyar for the purpose of the maintenance of the ladies and the children of the family, decrees for maintenance were passed against him to be satisfied out of the properties held by him. What is more, his own witnesses regarded the properties in his possession as being *tarwad* properties and he as being the *karnavan*. The statement of the defendant that he was bound to maintain out of the properties held by him the third Nayar on his reaching majority in itself amounted to an admission that the properties in his hands were not *stanom* properties. In the translation of the judgment in the mother's suit the defendant is referred to as the "*stani*," but it is admitted that this word is not to be found in the original. In the judgment in the mother's suit there is this passage:

> " On looking into the matters mentioned above, there is nothing to show on what grounds the plaintiff had gone and lived separate from the tarwad members of her own accord—in disregard of the orders of the present Kavalappara Moopil Nair and without considering the status, dignity and the propriety (of the *stanom*). Even though the defendant's contention in his written statement that it is the Amma Nethiyar who should look after the maintenance of the plaintiff inasmuch as the plaintiff did not return to and stay in Kavalappara in spite of the attempts made through the Brahmins and other respectable persons to avoid the *moopu* getting a bad name—owing to a rumour getting afloat that there is dissension among the members as a result of the plaintiff's action, is a proper one, the Court is of the opinion that, if the members—who are related to the Moopil Nair as his direct sister and direct nephew like third Nair and who are closely related together as heirs to the properties—live separate for any reason whatsoever and ask for their maintenance, the Moopil Nair ought to have ordered payment of their maintenance amounts and maintained them in accordance with their status (in the *stanom*). Instead of doing so this, the Moopil Nair cannot stop the maintenance paid to the Anandiravans who may be of bad temperament."

The word "*stanom*" which appears twice in the translation is not to be found in the original. It also appears erroneously in the translation of the judgment in the son's suit. Neither of the judgments can be read as supporting the claim put forward by the present defendant. On the contrary they are very much against him.

The next event of importance is a suit filed by the Elaya Nayar (the second senior member of the family) and four other members of the *tarwad* in 1859, in the Zilla Civil Court of Calicut and numbered O. S. No. 2 of 1859. The first defendant was the Muppil Nayar of that time. It was filed to recover possession of properties which the plaintiffs alleged were the ancestral possessions of the family of which they and the Muppil Nayar were members and in which they owned equal rights. The plaintiffs allege that the Muppil Nayar was incompetent to manage the affairs of the family and that by an agreement in writing dated the 29th September, 1857, he had undertaken that the affairs of the family should be managed by the first plaintiff. The plaintiffs sought a decree enforcing the agreement. The defence was that the agreement had not been entered into and that the properties of which the plaintiffs sought possession were *stanom* properties which had devolved upon the first defendant as the senior male member of the *tarwad*. The Court held that the plaintiffs had not proved the alleged agreement and that therefore it was not necessary to decide whether the properties belonged to the *tarwad* or to *stanoms*.

The Muppil Nayar who was the defendant in that suit died in 1872 and the only surviving member of the family was Parvathi Nethiyar, whose name appears first in the geneological tree which we have set out at the beginning of the judgment. She was a child at the time and consequently all the properties of which the last Muppil Nayar died possessed of were taken charge of by the Court of Wards, which remained in charge of the estate until her son Appukuttanunni Muppil Nayar became of age in 1910. All the properties held by her predecessor, including the properties which had been held by the Amma Nethiyar of 1817 were transferred into the name of Parvathi Nethiyar. Throughout the management of the pro-

perties the Court of Wards regarded them all as belonging to the *tarwad* and not as belonging to *stanoms*.

From 1878 to 1892, Mr. W. Logan was the Collector of Calicut. In 1891, a collection of treaties, engagements and other papers of importance were edited by him and were published by the Madras Government. Mr. Logan had a great knowledge of the people and the customs of Malabar and it is not without significance that he treated the properties comprising the estate as belonging to the *tarwad*. On the 9th December, 1880, he directed an inquiry to be held with regard to the nature of certain of the properties of which the Court of Wards had taken charge. The report is not on the record, but presumably did not disclose that any of them were attached to a *stanom* because the Court of Wards continued to regard all the assets as belonging to the *tarwad*. It may be mentioned that on the 18th September, 1895, the agent of the Court of Wards issued a questionnaire to the manager of the estate. The manager was asked whether there were more *stanoms* than one in the " Kavalappara Swarupam " ; if so, what were they ; whether there were separate properties attached to each of the stanoms ; and if so what those properties were? The manager submitted a report which according to a statement therein was made merely on a perusal of the records. In the report the manager expressed the opinion that there were no separate properties set apart for the maintenance of the members of the *tarwad* who were not *stanis*. This is obviously not correct, because, as we have already indicated, properties had been set aside for the maintenance of the Amma Nethiyar and of the other ladies and of children of the family. He also stated that it was the custom of the Muppil Nayar to give to the other members, from out of the *stanom* properties, the expenses for their maintenance and therefore they had a claim to the *stanom* properties for their maintenance. The manager's opinion can carry no weight as it was not based on personal knowledge. Moreover, the Court of Wards later took the opinion of the late Mr. P. R. Sundara Ayyar. This opinion was excluded from the record by the trial Judge and we have refused to admit, as such opinions do not constitute legal evidence. The fact remains, however, that the Court of Wards disregarded the answers of the manager to the questionnaire.

In 1896, Parvathi Nethiyar asked the Court of Wards to continue in management of the estate until her son Appukuttanunni, who was then in his sixth year, became of age. This is to be gathered from a letter, dated the 29th November, 1886, written by Mr. Logan as the Collector of Calicut and Agent to the Court of Wards to the Secretary to the Court of Wards. Her request was complied with. Parvathi Nethiyar died in 1904. On the 16th August, 1905, the Government passed an order recognising Narayani Nethiyar, her eldest surviving child, as the "proprietrix" of the estate and she remained the holder of it until her brother Appukuttanunni became of age in 1910 when the Court of Wards handed over it to him as the *karnavan* of the *tarwad*.

Appukuttanunni treated all the properties of which he became possessed as belonging to the *tarwad*. This is admitted and therefore it is not necessary to examine in detail the documentary evidence which proves this fact. We will, however, mention that in giving evidence in O. S. No. 34 of 1918 in the Court of the Subordinate Judge of Ottapalam Appukutanunni stated in examination in chief and also in cross examination that the accounts which he kept related to the *tarwad* and that he had no separate accounts relating to the Erappe temple, with which the suit was concerned.

Appukuttanunni died in 1925 and was succeeded by the present defendant, who until the year 1934 continued to regard himself merely as the head of the *tarwad* and the properties in his possession as belonging to the tarwad. In a petition to the Court of the Subordinate Judge of Ottapalam, presented in the month of December, 1926, asking for a succession certificate in respect of certain properties held by Appukuttanunni he said :

"Your petitioner is the senior male member *karnavan* and manager of his family and claims administration of all his properties and credits as his brother and the present *karnavan* manager of the family."

In a letter addressed to the Nedungadi Bank, Ltd., dated 12th November, 1925, the defendant referred to himself as the "present *karnavan* of his *tarwad* and legal representative" of Appukuttanunni. In a petition dated the 5th February, 1926, filed by Appukuttanunni's widow asking for a succession certificate to enable her to receive payment of an amount due on a policy of life insurance taken out by her deceased husband she described the respondent as "the *karnavan* and manager of the family," and he consented to the petition being granted.

The Madras Marumakattayyam Act, 1932, came into force, on the 1st August, 1933 and in the month of March 1934, the plaintiffs applied for the registration of the *tarwad* as being an impartible *tarwad* under section 43 of the Act. It was not until this happened that the defendant denied the right of the *tarwad* to the properties in the suit. He apparently feared that later an application for partition might be made under section 44. In spite of his opposition an order for registration was made. In consequence of the change in the attitude of the defendant the appellants filed the present suit in order that there should be an authoritative decision on the question of the ownership of the properties in the hands of the defendant.

Mr. Venkatarama Sastriar on behalf of the respondent has contended that the decisions given in the suits of 1817 and all that has happened from 1872 until the plaintiffs applied for the registration of the *tarwad* in 1934 should be ignored because there have been numerous instances of the head of the family acquiring properties, granting *kanams* and suing tenants in *stanom* names. Even without the oral evidence which has been given in this case we consider that the Court would not be justified in accepting this plea but when the oral evidence is considered there does not appear to be room for doubt that the plea should not be accepted.

P. M. Chappunni Valia Nayar, (P.W. 1) is the head of the family which was a ruling family before 1792. He states that the properties held by him as the head of the family belong to his *tarwad* and are not *stanom* properties, although he still possesses a *stanom*. M. Krishna Variar (P.W. 2) is a pleader practising in the Walluvanad District Munsiff's Court. He is the receiver of the Parakat *alias* Kundarakal Nayar's family properties. He states that the Parakat Nayar has a *stanom* name, but all his properties are *tarwad* properties. P. Sankunni Menon (P.W. 4) is the manager of the properties of another ancient family possessing a *stanom* title. He says that the properties of the family do not belong to the *stanom*, although the *stanom* name is usually recited in documents. Similar evidence is given by M. Sankunni Nayar (P.W. 5) Mookunni Kurup (P.W. 6), K. Madhavanunni Muppil Nayar (P.W. 7), K. T. Ramanunni Nayar (P.W.8) and P. Govindan Nayar, a witness called by the respondent. K. Madhavanunni Muppil Nayar who possesses three *stanoms* states that the properties held by him belong to his *tarwad* and that there are no properties belonging to his *stanoms*. K. T. Ramanunni Nayar, an advocate of 27 years' standing is a member of a *tarwad* possessing a *stanom* and in this case also the properties all belong to the *tarwad*. P. Govindan Nayar was the fifth witness for the defence and his evidence is equally strong in support of the contention that *stanom* titles do not in these days necessarily imply that there are *stanom* properties. The defendant led evidence to show that in certain families properties are still held as *stanom* properties, and that that is the case cannot be denied. All that the plaintiffs say is that the fact that *stanom* names are used in formal documents does not imply that the properties held by the defendant are *stanom* properties and this is obviously the case. It is admitted that since 1910 the head of the family has only used the *stanom* name "Karakkat Kumaran Raman." All other *stanom* names have been abandoned.

In the judgment under appeal reference is made to "the Kavalappara swarupam" The word *swarupam* is defined by Moore as "a dynasty" and by Logan as "dynasty, family." In Wilson's Glossary the definition is "Natural form, inherent property or nature; it is sometimes used in the dialects for property in land or money, an

estate." In many of the exhibits the word *swarupam* has been translated as "estate." As a subsidiary meaning of the word this is no doubt legitimate, but it is not a correct translation of the word wherever used in the documents which have been exhibited. In the course of the arguments the Court asked Mr. Venkatarama Sastriar whether he could point to a single document on the record where the word "*swarupam*" could correctly be translated as "estate," and he was not able to point to one. Therefore it may be taken that so far as this case is concerned the word "*swarupam*" wherever used means "family." We draw attention to this fact lest it should be said that we have not had regard to the meaning of the word when considering the documentary evidence. It may be added that in paragraph 3 of his written statement the respondent refers to his family as being a *swarupam*. In a statement made to the Collector when he was opposing the registration of the *tarwad* as impartible he referred to the family as "the Kavalappara swarupam". In the agreement entered into by the East India Company with the Zamorin in 1806, with regard to the payment of *malikhana* the word *suruwam* which is the same as *swarupam* is used in the same sense.

The position may be summarised as follows:

(1) The defendant's case that all the properties belong to the ancient *stanoms* of his family has broken down. Admittedly there are properties now held by him which are not of *stanom* character, namely, the properties formerly held by the Amma Nethiyar.

(2) Admittedly properties have been acquired by successive heads of the family out of the income of the lands held by them and it has not been shown that these accretions have been merged into *stanoms* which means that they must be regarded as being *tarwad* properties.

(3) In the suits of 1817 the defence put up by the then Muppil Nayar is entirely inconsistent with the present claim that the properties in the hands of the defendant belong to *stanoms* and the judgments emphasise this. There is here strong indication that the then head of the family did not regard any of the properties held by him as being *stanom* properties. The great change which took place in 1792 was no doubt responsible for this. Since that year the Government has consistently treated all *stanom* lands as being held under *ryotwari* tenure and the holders have paid land revenue accordingly.

(4) From 1872 when the Court of Wards took charge of the estate, until 1910, when it handed it over to Appukuttanunni, the Court of Wards, a statutory body, in full possession of the facts, regarded the estate as belonging to the *tarwad*.

(5) Appukuttanunni, and after him the present defendant, until the application was made by the plaintiffs in 1934 for the registration of the *tarwad* under section 43 of the Marumakkattayam Act, recognised the right of the tarwad in all the properties.

(6) As the family is governed by the Marumakkattayam law the presumption is that the properties held by the head of it belong to the *tarwad* and on him who contends otherwise lies the burden.

(7) The defendant has made no attempt to show that any of the properties held by him belonged to *stanoms* acquired or granted to his forbears.

For these reasons we consider that the appellants' case is well founded and that they are entitled to the decree which they seek. Consequently the appeal will be allowed with costs here and below. We fix the fee of the senior advocate at Rs. 2,000 and certify for two counsel.

B.V.V. *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING AND MR. JUSTICE SHAHABUDDIN.

Chikati Guruvulu .. *Appellant.**

*Indian Penal Code (XLV of 1860), section 300—Death resulting from injury caused only with a view to facilitate theft of jewels—Charge for offence of murder—Sustainability.*

The accused caused injuries to the nostrils of the deceased which eventually brought about her death. But his only intention was to steal the nose rings of the deceased and from his point of view the only violence which he caused was that necessary in order to facilitate the theft of those jewels. In the circumstances,

*Held,* that in the absence of any evidence that the injuries to the nostrils were sufficient in the ordinary course of nature to cause death or were such as the accused knew to be likely to cause death, or were so imminently dangerous that they must in all probability cause death, a charge for murder could not be sustained.

Appeal against the order of the Court of Session of the Vizagapatam division in C. C. No. 32 of 1943 dated 13th August, 1943.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Appellant not represented.

The Judgment of the Court was delivered by

*King, J.*—The appellant has been found guilty by the learned Sessions Judge of Vizagapatam for the murder of an elderly woman named Ganagalla Seetamma on the night of the 1st May last. There is no doubt that the deceased met her death on that night and that both her nostrils were cut and certain jewels taken from her after the cutting. The evidence which has been accepted by the learned Judge as proving that the appellant was responsible for the injuries to the nostrils, which in their turn brought about the woman's death, is mainly that afforded by a confession of the accused himself. He has stated after he was arrested that he had throttled the deceased and killed her and removed her nose rings by force and he promised to reveal the hiding place of those rings. In due course he produced the rings which have been exhibited as M. Os. 1 and 2. There is also evidence from two witnesses, P. Ws. 7 and 8, that at or near the time when the offence must have taken place they saw the appellant near the house of the deceased in which she was killed.

The learned Judge, after accepting this evidence, has held that the appellant is guilty of murder. It has, however, not apparently struck the learned Judge that any discussion is necessary as to whether the appellant was actuated by any of the intentions defined in section 300, Indian Penal Code. He has been found guilty of murder at the conclusion of the judgment, although every indication that can be discovered in the earlier portions of the judgment suggests that the appellant could not possibly have had any intention to kill the deceased. The cause of death is given in the medical evidence as shock and hæmorrhage, and one must presume that the hæmorrhage was caused by the injuries to the nostrils. There is nothing in the evidence to suggest that injuries of this kind would in the ordinary course of nature bring about death, and we think that in this sense also death in this case was unexpected and was due probably to the age and feeble health of the deceased. The accused no doubt says in his confession that he throttled the deceased. But the medical evidence shows only very slight signs of asphyxia. It is quite obvious that if the appellant had deliberately intended to kill the deceased by throttling her he could easily have achieved that purpose and that when he mentioned in his confessional statement that he had throttled her he was giving a mistaken view as to the real cause of her death, a mistake which was natural enough in view of the fact that he must have seized her by the neck.

In paragraph 10 of the judgment the learned Judge clearly holds that the murder was what he has called accidental, that is to say, that the only intention of the appellant was to steal the jewels of the deceased and that from his point of view

* Crl. Appeal No. 726 of 1943. 20th January, 1944.

the only violence which he committed was that necessary in order to facilitate theft, and the death of the deceased was entirely unexpected.

On these facts the conviction of the appellant for the offence of murder cannot be sustained. The appellant, we feel quite satisfied, is guilty of having caused the injuries to the nostrils of the deceased which resulted in her death. But his intention could only have been to cause those injuries, and in the absence of any evidence that the injuries were sufficient in the ordinary course of nature to cause death or were such as the appellant knew to be likely to cause death, or were so imminently dangerous that they must in all probability cause death, the charge of murder must fail. We accordingly acquit the appellant of murder and substitute for that conviction a conviction under section 325, Indian Penal Code. The hurt which was caused is in our opinion grievous hurt, because it would have resulted in a permanent disfiguration of the face. We sentence the appellant to five years' rigorous imprisonment.

Before leaving this case, we wish to point out that if the conviction for murder could have been sustained the only possible sentence would have been one of death. We are very dissatisfied with the reasoning of the learned Judge in paragraph 15 in which he explains why he has decided to impose the lesser sentence, and we must protest against the absurdity of imposing the lesser sentence in order that the accused might stand his trial for robbery.

V. S. *Conviction for murder set aside and conviction for grievous hurt substituted.*

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## [PRIVY COUNCIL.]

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD ATKIN, LORD PORTER AND SIR GEORGE RANKIN.

Chaudhary Paras Ram Singh and others .. *Appellants**

*v.*

Babu Raja Mohan Manucha and others .. *Respondents.*

*Mortgage—Promissory note and contemporaneous deposit of title deeds at Delhi—Nature of right created—Same property subsequently mortgaged along with other properties to different persons—Recital as to title deeds being with the former creditor—Absence of inquiry by subsequent mortgagee—Right to priority.*

Two businessmen at Delhi arranged to borrow from the plaintiff, a money-lender at Faizabad, a certain sum of money and upon the terms that title deeds of property worth about double the amount borrowed would be deposited as security. In pursuance of the arrangement, a promissory note for that amount and the title deed of a property in Agra of the agreed value were handed over to the plaintiff's agent at Delhi who forwarded them to the plaintiff along with a covering letter giving details of the property the title deed of which was given as an ' additional and collateral security ' for the promissory note. The debtors subsequently executed a mortgage over their properties including this property in favour of the contesting defendants wherein it was recited that the title deed of the property in Agra was with the plaintiff and that it would be taken back from him and delivered to the mortgagees. In a suit by the plaintiff to enforce the mortgage made by the deposit of the title deed,

*Held*, that there was no room to doubt that by the deposit of the title deed there was an intention to create a security. The letter of the plaintiff's agent to the plaintiff could not be regarded as itself constituting the agreement between lender and borrower. The subsequent mortgagees had notice of the plaintiff's mortgage and they were put on inquiry whether the security offered to them by the debtors was offered in fraud of the plaintiff. As the Transfer of Property Act was never applied to the Punjab and does not invalidate mortgages made in Delhi by deposit of title deeds, the plaintiff's mortgage must have effect; and the contesting defendants having taken title at a later date and with notice of the plaintiff's right have no claim to priority.

*C. S. Rewcastle* and *S. P. Khambatta* for Appellants.

*L. M. Jopling* for Respondents.

Their Lordships' Judgment was delivered by

SIR GEORGE RANKIN.—The plaint in this case was filed in the Court of the Subordinate Judge at Agra on 11th August, 1930, by one Moti Lal Manocha, a

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* P. C. Appeal No. 62 of 1942. 24th November 1943.

banker and money-lender, resident at Faizabad. He died in 1933 and respondents 1 to 4 have been substituted in his stead. He impleaded two sets of defendants. The first set are now respondents 6 to 9, who take no part in this appeal. They include two persons called Rup Narain and his son, Raj Narain, whose acts as borrowers and mortgagors come into question in this case. The other set of defendants are the present appellants sometimes referred to by their family designation as "the Chaudharys." The plaintiff sued to enforce a mortgage made by deposit of a title deed dated 26th February, 1863, to certain land and buildings in the city of Agra. He alleged that early in September, 1923, Rup Narain and Raj Narain who carried on business at Delhi, arranged in August, 1923, to borrow Rs. 30,000 from him upon a promissory note and upon the terms that title deeds of property worth about Rs. 60,000 would be deposited as security. He alleged further that the title deed of 1863 had been handed over as security in Delhi to his brother-in-law, Lakshmi Narain, who was acting on his behalf, together with a promissory note dated 3rd September, 1923, carrying interest at 12 per cent. with half-yearly rests and a receipt also dated 3rd September, 1923; and that these three documents had been forwarded to himself (the plaintiff) at Faizabad by a letter of 6th September from Lakshmi Narain. The letter (Ex. 4) is as follows:

"Rai Sahib Rup Narain, Bar.-at-Law and Magistrate, 1st Class.

Delhi,
6th September, 1923.

My Dear Brother,

Herewith the pronote, receipt and the title-deed. This deed is a joint sale-deed of two properties in favour of Lala Ram Chand through whom Mr. Rup Narain has inherited the property. Munshi Gurdial Singh, father of Mr. Rup Narain obtained the succession certificate with regard to this property on 1st September, 1863, along with other properties left by L. Ram Chand his uncle. I have seen the original certificate and if you require I will send a certified copy of the same to you. Out of these two houses one has been recently re-built and consists of 6 shops and double storied 'bala-khanas' on them yielding a monthly rent of Rs. 187 net. The present market value of this property is between 60 or 70 thousand rupees. Mr. Rup Narain is placing this one property with you as an additional and collateral security for his pronote of Rs. 30,000. In case he requires this document back any time before the payment of your debt, he will place with you another deed of a property recently acquired by him through a decree of Court. I hope you will find this all in order and satisfactory. Your cheque has been endorsed over by Mr. Rup Narain to the Imperial Bank for collection and no sooner he gets the money he will send you Rs. 1,000 your commission.

I really thank you for so promptly complying with my request.

With respects to elders and love to children.

I am your sincerely,
(Sd.) LAKSHMI NARAIN.

[With kind regards.

6th September, 1923. (Sd.) Rup Narain.]"

The promissory note was renewed on 21st August, 1926, for the sum of Rs. 42,000 and the new note was registered by the Sub-Registrar at Delhi. In 1928, insolvency proceedings were begun against Rup Narain which resulted in adjudication in the following year, and on 11th March, 1929, a notice requiring payment of Rs. 55,162 as due under the renewed note was served on him by the plaintiff.

The appellants were impleaded as persons who had taken a later mortgage over the property in suit with knowledge of the plaintiff's mortgage and had later still taken a sale-deed. On 12th October, 1923, Rup Narain and Raj Narain executed a mortgage bond (Ex. 2) in favour of a vakil at Agra called Pandit Parbhu Dayal in which they recited their indebtedness to him on hundis to the amount of Rs. 1,25,000 and purported to hypothecate therefor certain properties including the property now in suit, stating in the bond that "the title deeds of this property are with Rai Sahib Babu Moti Lal and hence the same have not been made over to Panditji." On 13th June, 1924, Rup Narain and Raj Narain executed a mortgage deed over the same properties in favour of the appellants' predcessors for Rs. 30,000 and interest thereon. This deed recited the previous deed of 12th October, 1923, and stated that the sum lent was left with the lender to pay off Pandit Parbhu Dayal in respect of this property pursuant to that deed. It was further recited;

"And the property aforesaid is now free from all sorts of hypothecation lien. I shall take back the former 'sanads' relating to the property from Babu Moti Ram and shall give them at once to Chaudhri Sahibs aforesaid."

Finally, by deed (Ex. Y) dated 1st January, 1928, the mortgagors reciting that they had persuaded the appellants' predecessors to purchase the property as the interest was mounting, transferred it to them by way of conditional sale on terms which need not here be detailed.

The trial Judge held that the title deed was not given to the plaintiff with a view to create a security for the loan, that if it was so given no valid security was thereby created, that the plaintiff was only entitled to a money decree against the first set of defendants (now represented by respondents 6 to 9) and that as against the appellants the suit should be dismissed.

The High Court in appeal on 21st April, 1938, reversed this decision and gave the plaintiff a preliminary mortgage decree for sale, it not being disputed before them that a mortgage could be created at Delhi by deposit of title deeds. It was contended in the High Court that the letter of Lakshmi Narain to the plaintiff, dated 6th September, 1923, was a fabrication, and that the title deed was not enclosed therewith to the plaintiff. This contention was rightly rejected by the learned Judges who point out in their judgment that there is no evidence in support of it and that the oral evidence to the contrary is supported by the documents. Mr. Rewcastle for the appellants disclaimed any contention that the letter was a fabrication and confined himself to questioning whether there was any intention to create a security. Their Lordships however see no room for doubt upon that point. The letter of 6th September, 1923, being written by the plaintiff's agent to the plaintiff cannot be regarded as itself constituting the agreement between lender and borrower, and their Lordships cannot find that it has at any time been suggested that the security is invalid by reason that the letter was not registered.

What then is the position of the appellants, who took their interest in the property in suit with knowledge that the title deeds were on 12th October, 1923, with Moti Lal? It has been suggested that they merely supposed this to mean that the property had been offered to Moti Lal as a prospective purchaser and that he was looking into the title before making up his mind. But this suggestion is without substance even as regards the date 12th October, 1923, while in relation to the date June, 1924, it is plainly impossible. No lender would have been content to accept it even if it had been solemnly put forward by the borrower. The plaintiff was in business as a money-lender, and to say that he held the deed was much as if the borrower had said that his deeds were with his bank. That a mortgage should have to be executed while a prospective purchaser had got so far as to be looking into the title is not in itself probable; and even if the prospective purchaser could not make up his mind he could return the deed when he had read it, or give a receipt for it to enable the mortgage to go through. Lenders are not uninterested in prospective purchasers from whom they would get their money back immediately. The finding of the High Court that Pandit Parbhu Dayal and the appellants had notice of the plaintiff's mortgage is fully justified. The question is not whether they were negligent in not enquiring whether their borrower had parted with the title deeds. If that had been the only point it would on the facts of this case have required careful consideration. But they were told that he had parted with the deeds to the plaintiff and they made no inquiry of the plaintiff—the only person to whom the inquiry could safely or usefully be addressed. They were put on inquiry whether the security offered to them by Rup Narain and Raj Narain was offered in fraud of the plaintiff. This is now shown to be the truth as an inquiry would have at once disclosed. There is no ground for the contention that the title deed of 1863 was not a proper and sufficient deed to be deposited for the purpose of creating a security over the property in suit. As the Transfer of Property Act was never applied to the Punjab and does not invalidate mortgages made in Delhi by deposit of title deeds the plaintiff's security must have effect; and the appellants having taken title at a later date and with notice of the plaintiff's right have no

claim to priority: Compare *Varden Seth Sam* v. *Luckpathy Royjee Lallah*[1]. It has not been contended that the Registration Act confers priority in such a case and their Lordships find it unnecessary to discuss that statute. They will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of respondents 1 to 4, who are at liberty if necessary to add their costs to their security.

Solicitors for Appellants: *T. L. Wilson and Co.*

Solicitors for Respondents: *Hy. S. L. Polak and Co.*

V.S. *Appeal dismissed.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Janaswami Purna Hanumantha Rao .. *Appellant**

*v.*

Janaswami Ramachandrayya *alias* Prahlad, minor by mother and next friend, Janaswami Lakshmiprasannam and others .. *Respondents.*

*Evidence Act (I of 1872), sections* 112 *and* 118 *to* 120—*Issue as to paternity—Evidence of either parent as to non-access at the time when conception could have taken place—Admissibility—Section* 112—*Child born during coverture—Presumption—Evidence of non-access—"Access"—Meaning.*

There is nothing in the Evidence Act which debars a husband from giving evidence of non-access to his wife, even though the effect of such evidence may tend to prove that a child born during the continuance of the marriage to the wife is illegitimate.

A husband or wife of any party to a suit is a competent witness under section 120 of the Evidence Act and to find out what evidence a competent witness can give, regard must be had to the general rules of relevancy and admissibility as laid down in the Evidence Act subject only to such special exceptions as the Indian statute law embodies.

*Russell* v. *Russell,* (1924) A.C. 687 considered; *Sweenney* v. *Sweenney,* (1935) I.L.R. 62 Cal. 1080 not approved; *John Howe* v. *Charlotte Howe,* (1913) 25 M.L.J. 594: I.L.R. 38 Mad. 466 (F.B.) relied on.

The law governing proof of legitimacy of a child born during the continuance of a marriage is laid down in section 112 of the Evidence Act. The fact that the child was born during the continuance of a valid marriage between the mother of the child and her husband is conclusive proof that the child is a legitimate child of the husband, unless it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. The word "access" in section 112 of the Evidence Act does not mean actual sexual intercourse and the only way in which the presumption under the section can be displaced is by proof that the parties to the marriage had no opportunity for intercourse with each other at any time when the child could have been begotten.

*Karapaya Servai* v. *Mayandi,* (1933) 66 M.L.J. 288: I.L.R. 12 Rang. 243 (P.C.); *Krishnappa* v. *Venkatappa,* (1943) 2 M.L.J. 108; *Manikka Mudaliar* v. *Ammakannu,* (1941) 54 L.W. 411 relied on; *Jagannatha Mudali* v. *Chinnaswami Chetti,* (1931) 61 M.L.J. 878: I.L.R. 55 Mad. 243; *Samuel* v. *Annammal,* (1934) 66 M.L.J. 279 held to be incorrect.

Appeals against the decrees of the Court of the Subordinate Judge, Guntur, in O.S. No. 49 of 1938.

*Ch. Raghava Rao* for Appellant in Appeal No. 79 of 1942 and for Respondent in Appeal No. 80 of 1942.

*S. Panchapagesa Sastri* and *G. C. Venkatasubba Rao* for Appellant in Appeal No. 80 of 1942 and for Respondent in Appeal No. 79 of 1942.

*V. Subramaniam* for Respondent in both.

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1. (1861-63) 9 M.I.A. 303 at 322-3 (P.C.).

*Appeals No. 79 and 80 of 1942. 31st January, 1944.

The Court delivered the following

JUDGMENT.—These appeals arise out of a suit for partition brought by the minor plaintiff with his alleged mother as his next friend. The first defendant is alleged to be the father of the plaintiff; the second defendant is the first wife of the first defendant, and the third defendant is their daughter. In A.S. No. 79 the appellant is the first defendant. In A.S. No. 80 the appellant is the second defendant. There is also a memorandum of cross-objections by the plaintiff. The plaintiff's next friend, Lakshmiprasannam, was a widow when she married the first defendant on the 17th March, 1935. For the sake of brevity she will be referred to as P.W. 6. The first defendant is a pleader who at that time was carrying on a practice in two towns of the Guntur district, Narasaraopet and Gurzala. He had no son by his first wife, whose health was poor, though we are informed that a son has been born to her since the suit was filed. The parties are Brahmins and the marriage of the first defendant to a widow was naturally regarded as unorthodox. P.W. 6 lived with her husband, first at Narasaraopet, and then for a short time at Gurzala.

In February, 1936, the first defendant discovered letters which led him to believe that P.W. 6 was carrying on an intrigue with her husband's cousin, Suryanarayana and at the instance of this individual was administering noxious drugs to her husband. He reported to the Police and P.W. 6 was arrested but released on bail. In March, 1936, there seems to have been some sort of a reconciliation between the husband and wife and they resumed co-habitation. The complaint to the police was rejected and P.W. 6 continued to live with her husband. But at the end of May, 1936, she made a complaint to the police that her husband had attempted to strangle her. She left him and went to Guntur where she spent some time with her uncle and others.

From the 2nd July, 1936, to the 10th September, 1936, after another reconciliation the first defendant was once more living with P.W. 6 in a house in Brodipet, Guntur. These dates are most important, for the plaintiff is alleged to have been born on the 18th April, 1937, so that in the ordinary course of nature he would have been conceived at or about the end of the first week of the previous July. In November, 1936, the first defendant was apprised by means of a written statement filed by P.W. 6 in a suit relating to the incriminating letters that she was pregnant. There is abundant evidence to show that she was admitted into the Government Hospital, Guntur, on the 18th April, 1937 and that she gave birth to a son on the same day. When, however, the birth was reported to the Municipal authorities, two mistakes were made in the report: the name of the mother was wrongly given as Lakshminarasamma instead of Lakshmiprasannam and the name of the father was given as Sistla Venkatakristnayya which is the name of P.W. 1. P.W. 1 deposes that he is a distant relation of the lady and that it was he who took her to the hospital when she was taken ill. There is no evidence that any other woman called Lakshminarasamma gave birth to a child in the Government Hospital, Guntur, at this time and it was only after the plaintiff had instituted proceedings for the correction of the municipal birth register that the first defendant began to deny that the plaintiff was the child of P.W. 6.

A great deal of time was taken in the argument of the first defendant's appeal on the two questions connected with the birth of the plaintiff. The denial of the maternity of P.W. 6 seems to have been based almost entirely on the error in the report which the hospital authorities sent to municipal office. We see no reason to go in detail into this question for we agree entirely with the lower Court that it was abundantly proved that the plaintiff is the son of P.W. 6 and that he was born in the Government Hospital, Guntur, on the 18th April, 1937. Not only are these facts established by the hospital registers, but the plaintiff has examined another lady who was a patient in the labour

ward of that hospital at the same time; and the entire absence of any challenge to the birth until after the rectification proceedings were taken in December, 1938, makes it clear that there is no substance in the doubts upon the maternity of P.W. 6.

A more substantial question relates to the paternity of the first defendant. In the lower Court the first defendant was allowed to depose that though he was co-habiting with P.W. 6 at the time when the child was presumably conceived, he was not the father of the child. Arguments have been heard on the question whether the rule in *Russell* v. *Russell*[1] applies to the trial of legitimacy proceedings in India. A Full Bench of the Calcutta High Court in *Sweenney* v. *Sweenney*[2] *has* held that the *Russell case* is good law in India and that whether in divorce or in legitimacy proceedings the husband cannot be allowed to give evidence of non-access so as to bastardise the child. There is, however, a Full Bench decision of this High Court which was criticised by the Calcutta High Court in the case just quoted, from which a contrary view can be deduced. We refer to the decision in *John Howe* v. *Charlotte Howe*,[3] where it was held that whatever be the common law of England on the subject, under sections 118 and 120 of the Indian Evidence Act, both the parties to proceedings for divorce are competent to give evidence as to non-access and the consequent illegitimacy of the child. This decision was before the *Russell case;* but it is to be noted that the House of Lords in the *Russell case* did not purport to do more than lay down that what was admittedly the pre-existing common law of England in legitimacy proceedings on the subject of the admissibility of the evidence of husband or wife applied equally to divorce proceedings when that evidence tended to bastardise a presumed child of the marriage. The Full Bench of this Court held that on such matters Courts in India are governed not by the common law of England, but by the Indian Evidence Act. Under section 120 of that Act the parties to the suit and the husband or wife of any party to the suit are competent witnesses in all civil proceedings. When we wish to find out what evidence a competent witness can give, we must have regard to the general rules of relevancy and admissibility as laid down in the Evidence Act, subject only to such special exceptions as the Indian statute law embodies. In our opinion there is nothing in the Evidence Act which debars a husband from giving evidence of non-access to his wife, even though the effect of such evidence may tend to prove that a child born during the continuance of the marriage to the wife is illegitimate. We are not now concerned with the question whether section 7 of the Indian Divorce Act can be read as importing the rule in the *Russell case* into the trial of divorce proceedings in India.

The law governing the proof of legitimacy of a child born during the continuance of a marriage is laid down in section 112 of the Evidence Act. The fact that the child was born during the continuance of a valid marriage between the mother of the child and her husband is conclusive proof that the child is a legitimate child of the husband, unless it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. The appellant in App. No. 79 has laid great emphasis on the decisions of Venkatasubba Rao, J., in *Jagannadha Mudali* v. *Chinnaswami Chetti*[4] and *Samuel* v. *Annammal*,[5] where the learned Judge deduces from certain English decisions the rule that the word "access" in section 112 of the Evidence Act means actual sexual intercourse and not a mere opportunity of intercourse. If this view is correct and if the deduction from *John Howe* v. *Charlotte Howe*[3] adumbrated above is applied, it would follow that the husband was rightly allowed by the lower Court, to swear that, though

1. (1924) A.C. 687.
2. (1935) I.L.R. 62 Cal. 1080.
3. (1913) 25 M.L.J. 594: I.L.R. 38 Mad. 466 (F.B.).
4. (1931) 61 M.L.J. 878: I.L.R. 55 Mad. 243.
5. (1934) 66 M.L.J. 279.

during the period when the child was presumed to be conceived, he was actually living with the mother and had every opportunity for complete marital relations, he did not, in fact, have sexual intercourse with his wife and that he was therefore not the father of the child. There is, however, clear authority of the Privy Council for holding that the decisions of Venkatasubba Rao, J., referred to above embody an incorrect view of the meaning of the word "access" in section 112. In the case of *Karapaya Servai* v. *Mayandi*,[1] their Lordships observe as follows:

> "It was suggested by Counsel for the appellants that 'access' in the section implied actual co-habitation, and a case from the Madras reports was cited in support of this contention. Nothing seems to turn upon the nature of the access in the present case, but their Lordships are satisfied that the word means no more than opportunity of intercourse."

Presumably the case referred to by their Lordships was one of the decisions of Venkatasubba Rao, J., which we have already quoted. It seems to us to be established by these observations of the Privy Council that the word "access" in section 112 of the Evidence Act does not mean actual sexual intercourse and that the only way in which the presumption under that section can be displaced is by proof that the parties to the marriage had no opportunity for intercourse with each other at any time when the child could have been begotten. We may add that since the decision of the Privy Council, two single Judges of this Court have recognised that the view taken by Venkatasubba Rao, J., must now be deemed to be erroneous—vide *Krishnappa* v. *Venkatappa*[2] and *Manicka Mudaliar* v. *Ammakannu*.[3]

That being the law, the conclusion of fact on the paternity issue becomes inevitable. The first defendant and P.W. 6 were living together as husband and wife in the same house at Guntur from 2nd July, 1936, to 10th September of that year; that is to say, they were living together during the whole of the period within which in the ordinary course of nature the plaintiff must have been conceived. There are no such circumstances as to make it impossible, or even improbable, that the first defendant could have begotten the plaintiff during this period. We must therefore hold that it is conclusively proved that the first defendant is the father of the plaintiff. We may add that the first defendant himself seems to have had no doubt regarding his paternity until about the time when the suit was filed. In fact, on receipt of the lawyer's notice indicating an intention to demand partition on behalf of the plaintiff, the first defendant sent a letter Ex. C-1 dated 20th December, 1937, which contains no indication that he had any doubt as to his fatherhood of the child. We find therefore that the plaintiff is the child of the first defendant by his wife, P.W. 6.

K.S. *Appeal No.* 80 *allowed and Appeal No.* 79 *allowed in part.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE BELL.

Seelam Ligamma .. *Appellant**

*v.*

Seelam Venkayya .. *Respondent.*

*Indian Succession Act (XXXIX of* 1925), *sections* 373 (3) *and* 375—*Application by a Hindu widow for issue of succession certificate—Security whether necessary in the circumstances—Question whether her husband had died divided to be first determined.*

Where a widow applied for the issue of a Succession Certificate in respect of a sum of money due to her deceased husband's estate and there was a will left by him which was silent with respect to the money but made provisions with respect to immovable proper-

1. (1933) 66 M.L.J. 288: I.L.R. 12 Rang. 243 (P.C.).
2. (1943) 2 M.L.J. 108.
3. (1941) 54 L.W. 411.

*A. A. O. No. 753 of 1943. 27th January, 1944.

ties, etc., and the lower Court demanded security from the widow, without deciding whether her husband had died divided or undivided from his brother,

*Held,* that if the deceased had died divided and there were no special circumstances, the widow would be entitled to succession certificate without security.

*Mt. Kausilla Kuer* v. *Mt. Sukhdei,* A.I.R. 1923 All. 579 and *Badri Narain* v. *Lachmina,* A.I.R. 1935 Pat. 10 followed.

Appeal against the order of the District Court of Guntur dated 30th September, 1943, and made in O.P. No. 70 of 1943.

*V. Rangachari* for Appellant.

Respondent not represented.

The Judgment of the Court was delivered by

*Mockett,* J.—The appellant is a Hindu widow who applied to the lower Court for a succession certificate in respect of a sum of money due to her deceased husband's estate. The respondent is her deceased husband's brother. He objected to the grant of the certificate alleging that he was the deceased man's undivided brother. The learned District Judge has directed the certificate to issue on condition that the appellant should furnish security. Accordingly a question under sections 373 (3) and 375 arose. Though it seems there was material before him the learned Judge did not think fit to decide this question of fact. He preferred to decide the rights of the widow to the succession certificate purely according to her status and the terms of the will. He said, also,

> "*Prima facie* the will gives the petitioner only a life interest with remainder to reversioners specified."

The will gives the petitioner a life interest in certain immoveable properties with remainder to named persons. It also gives her an absolute estate in certain immoveable properties. This succession certificate however is concerned with money and the will is silent with regard to that.

In order to shorten the litigation in this case we propose to deal with the legal aspect of this matter. There are three decisions of the Allahabad High Court directly in point. The first is *Jai Dei* v. *Banwari Lal,*[1] where Tudball and Muhammad Rafiq, JJ., held, that there might be special circumstances for requiring a Hindu widow to give security. In *Narain Dei* v. *Parameshwari,*[2] Richards, C.J., and Banerji, J., reaffirmed that security should not be taken from a Hindu widow of a separated Hindu asking for a certificate to enable her to collect debts in the absence of special circumstances rendering the taking of security necessary. The learned Judges point out that on an application by a widow the only question which arises when she is admittedly entitled to a certificate is whether there are special circumstances making it expedient that she should be directed to give security. More recently, in *Mt. Kausilla Kuer* v. *Mt. Sukhdei,*[3] Walsh and Ryves, JJ., dealt with the position in very direct terms. They said,

> "In the ordinary way a Hindu widow ought not to be called upon to give security at all. No doubt there are many reversioners who are interested, but it is not the business of the Court to go out of its way to look after the reversioners who have no vested interest and to assume everything against the widow."

With that statement of the law the High Court of Patna has expressed its agreement in *Badri Narain* v. *Lachmina.*[4] The learned Judges had before them exactly the point before us now and they approved in express terms the statement of the law which proceeded from the Bench in *Mt. Kausilla Kuer* v. *Mt. Sukhdei.*[3] We understand there is no direct authority in this High Court. We therefore think it right to express our agreement with the view held by

1. (1913) I.L.R. 35 All. 249.
2. (1917) I.L.R. 40 All. 81.
3. A.I.R. 1923 All. 579.
4. A.I.R. 1935 Pat. 10.

the Allahabad and Patna High Courts. It must be remembered that as pointed out by the Judicial Committee in *Vasonji Morarji* v. *Chandabibi*,[1] the estate taken by a Hindu widow is not to be regarded as an ordinary life estate. Their Lordships approved the statement of Mr. Mayne in the 8th Edition of his Hindu Law at page 870 to the effect that a Hindu widow's estate "is not a life estate, because, under certain circumstances she can give an absolute and complete title. Nor is it in any sense an estate held in trust for the reversioners. Within the limits imposed upon her the female holder has the most absolute powers of enjoyment." It may be that an order requiring a Hindu widow to give security for the realisation of debts due to her husband's estate would in many cases virtually involve a prohibition on the money being collected at all, and becoming barred by limitation. Accordingly, if in fact the deceased and the respondent became divided and in the absence of special circumstances the widow is entitled to a succession certificate without security. But the question as to whether they are or not divided has not been determined.

We remand the matter for re-hearing to the learned District Judge, who, after he has decided the question of fact relating to the division or otherwise, will deal with the question of the issue of a certificate in the light of the above observations. This is manifestly a case which the District Judge should dispose of as early as possible. The respondent does not appear. He will pay the appellant's costs of this civil miscellaneous appeal in any event and of the proceedings before the learned Judge out of which this appeal arises.

K.C. *Case remanded.*

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## [FULL BENCH.]

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, CHIEF JUSTICE, MR. JUSTICE LAKSHMANA RAO, AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

The Catholic Bank, Limited, Mangalore, by its Secretary, C.V.N. Pais .. *Appellant**

*v.*

F. P. S. Albuquerque .. *Respondent.*

*Companies Act (VII of 1913), section 152 (before its amendment by Arbitration Act X of 1940)—Reference by company of disputes to arbitration—If to be only under Arbitration Act, 1899—Such references are outside the scope of Civil Procedure Code (V of 1908), Schedule II.*

After the enactment of the Indian Companies Act, 1913, and before the Indian Arbitration Act, 1940, came into force a company could only enter into an arbitration under the provisions of the Indian Arbitration Act, 1899, and consequently companies were outside the scope of Schedule II of the Civil Procedure Code.

*Jhirighat Native Tea Co. Ltd.* v. *Bipul Chandra Gupta*, I.L.R. 1940 (1) Cal. 358 approved.

*Sitaram Balmukund* v. *The Punjab National Bank, Ltd.*, (1936) I.L.R. 17 Lah. 722 (F.B.) and *Karnataka Bank, Ltd., Mangalore* v. *Singarayya*, (1943) 2 M.L.J. 489 disapproved.

Appeal against the order of the Court of the Subordinate Judge of South Kanara dated 10th November, 1941, and made in R.E.P. No. 189 of 1938 in O.S. No. 6 of 1938.

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1. (1915) 29 M.L.J. 130: I.L.R. 37 All. 369 (379) P.C.
*A. A. O. No. 173 of 1942. 25th January, 1944.

*B. Sitarama Rao* and *S. J. S. Fernandez* for Appellant.

*K. Raja Aiyer* for *M. L. Nayak,* and *Pais, Lobo and Alwares* for Respondents.

(This Appeal coming on for hearing in the first instance on the 19th November, 1943, the Court, *Mockett* and *Kunhi Raman, JJ.,* made the following):—

ORDER OF REFERENCE TO A FULL BENCH.

*Mockett,* J.—The Catholic Bank, Ltd., Mangalore, is the appellant. The appellant is registered under the Indian Companies Act. The facts are to be found in paragraph 3 of the lower Court's judgment. They are as follows:—

Consequent on a dispute between the bank and the respondent with regard to the latter's liability to the appellant under two bonds dated June the 24th, 1936, and August the 27th, 1936, a reference to the arbitration of one Ambrose Castelino was made by means of a muchilika dated 31st December, 1937. This document has not been printed by either side. The arbitration proceeded and on the 3rd January, 1938, an award was passed directing the respondent to pay the sum of Rs. 53,500 with interest at seven percent. per annum upon the charge of certain properties. The award was filed in the Subordinate Judge's Court of South Kanara and "though the respondent appeared by an advocate, he did not raise any contention and a decree was passed in terms of it on the 29th July, 1938". The respondent later on paid Rs. 10,000 on the 27th August, 1938. On the bank seeking to execute the decree, the respondent objected that a reference between companies and persons could only be made under the Indian Arbitration Act of 1899, that under that Act the District Court had exclusive jurisdiction to enforce the award and therefore the Subordinate Judge's Court had no jurisdiction either to pass a decree or to execute it. The point raised is precisely the same as that which was decided on the 15th September, 1943, by my learned brothers, Somayya and Happell, JJ., in the *Karnataka Bank, Ltd., Mangalore* v. *Singarayya*[1], Somayya, J., at the beginning of the judgment states the position thus,

"The only question in this appeal is whether under the provisions of the Indian Companies Act, a company can refer any dispute between it and another person to arbitration only in accordance with the provisions of the Indian Arbitration Act."

The learned Judges remarked in the judgment that there appeared to be no decision of the Madras High Court on the question. Two decisions of other High Courts were, however, brought to their notice, which are in direct conflict with each other. A Full Bench of the High Court of Lahore in *Sitaram Balmukund* v. *The Punjab National Bank, Ltd.*[2] decided in 1936 that a company could apply to have an award filed in Court under paragraph 21 (1) of Schedule II, Civil Procedure Code; that is to say that it was not confined to the procedure laid down in the Indian Arbitration Act. In *Jhirighat Native Tea Co. Ltd.* v. *Bipul Chandra Gupta,*[3] Mitter and Lodge, JJ., took the opposite view and declined to follow the decision of the Lahore Full Bench. The learned Judges considered that all arbitrations between companies and persons should be effected in accordance with the provisions of sections 3 to 22 of the Arbitration Act of 1899. Somayya and Happell, JJ., preferred the Lahore view. For reasons which follow, I prefer the Calcutta view and I would accordingly refer the matter to the decision of a Full Bench.

It seems to be relevant and interesting to trace the history of arbitration procedure as laid down by statute. The Civil Procedure Code Act X of 1877 in sections 506 to 526 provide for references to arbitration. The Companies Act VI of 1882 contains sections 96 to 123, which relate to arbitrations. Section 96 says,

"Any Company under this Act may, from time to time, by writing under its common seal, agree to refer, and may refer, to arbitration any matter whatsoever in dispute between itself and any other company or person .........."

Section 96 contains the words "any company may under its common seal refer". This is of importance, because the argument before us has largely turned upon whether the word "may" should read "may" in its ordinary sense or "must". It has been contended by Counsel for the Bank that the word "may" is purely permissive and really means that a Company is empowered, if it wishes, to enter into an arbitration in the manner provided in section 96 but that it can, if it again wishes, enter into an arbitration in any other way it likes. I will record at once my view that "may" does mean "must". The word "shall" obviously would be inappropriate as it was never intended to compel companies to refer all matters in dispute to arbitration. Jessel, M. R. in *Ex parte Stephens,*[4] speaks of the,

"well known rule that where there is a special affirmative power given which would not be required because there is a general power, it is always read to import the negative,

1. (1943) 2 M.L.J. 489.
2. (1936) I.L.R. 17 Lah. 722 (F.B.).
3. I.L.R. (1940) 1 Cal. 358.
4. (1876) L.R. 3 Ch. 659 (660).

and that nothing else can be done, so that the power to register a trade mark used before the passing of the Act clearly negatives the conclusion that a distinctive word can be used as a trade mark first used as after the passing of the Act. A well-known illustration of this rule may be derived from the Act which gave power to railway companies to borrow on mortgage or bond. It was said that, irrespective of that Act, any Corporation might borrow, by common law either on mortgage or otherwise. The answer was, that there being a definite power given, you must import the negative so that the company could only borrow on mortgage or bond.''

No general rule can be laid down as to whether ''may'' is equivalent to ''must''. The position appears to be that whether ''may'' should be considered as ''must'' according to the special object of the statute and the circumstances. I consider that the provision that a company should arbitrate only under its seal is an imperative one and that it was never intended that a capricious discretion should be given to the company to arbitrate in any other way. If I am right, this view is of importance, as it seems to me virtually to decide the case. The topic is discussed in Maxwell on the Interpretation of Statutes, 8th edition, page 211, *et seq.* Equally in section 67 of the same Act (Act VI of 1882) I consider that ''may'' is imperative relating to the form in which contracts should be made. Otherwise it would read ''contracts on behalf of any company under this Act may (if the company wishes, otherwise not) be mads as follows.'' And passing for a moment, to section 88 of the Companies Act, 1913, when ''may'' also occurs the beginning of sub-section (1) would read in the same manner. Section 123 of Act VI of 1882, it seems to me, provides the procedure for enforcing an arbitration. I, of course, disregard the marginal note although it is in accordance with my view. The Arbitration Act of 1899, section 2 relates to arbitrations by agreement without the intervention of the Court. Section 2 subject to section 23 confines the Act to cases which could be filed in a Presidency town. We are told that no notification has been made in accordance with the proviso. The proviso to section 3 states,

''Provided, also, that nothing in this Act shall affect the provisions of the Indian Companies Act, 1882, relating to arbitration''.

It would appear then, upto and including 1899, the procedure was governed by the two Acts to which I have referred. The Indian Companies Act, 1913, section 152 provides as follows,

''A company may by written agreement refer to arbitration in accordance with the Indian Arbitration Act, 1899, an existing or future difference between itself and any other company or person.''

Section 290 read with the fourth schedule repeals the Indian Companies Act of 1882 in so far as it had not already been repealed. Sub-section (2) of section 88 of the 1913 Act and sub-section (*c*) of section 67 of the 1882 Act (last sentence) state that all contracts made according to these sections shall be effectual in law and shall bind the company..... .......from which it would seem to follow that contracts made otherwise would not be effectual in law and would not bind the company. Consequently, in order to make a binding contract, the procedure of sections 88 and 67 of the two Acts respectively should have been followed, when they operated respectively. Coming to section 152 of the Indian Companies Act of 1913, I consider that its meaning is as follows: A company may legally refer matters to arbitration; but if it does, there must be a written agreement (not under seal as was the old law) and the method of reference must be in accordance with the Indian Arbitration Act of 1899. In short, just as under section 88 Companies are restricted to a certain method of making contracts, so under section 152 are they restricted to a certain method of entering into arbitrations. The Court having jurisdiction under the Act of 1899 is the District Court. I respectfully agree with the reasoning of Mitter, J., in (1940) 1 Cal. 358 at p. 365 with regard to the effect of sub-section (3) of section 152 of the Companies Act of 1913.

''The words 'in pursuance of this Act' (*i.e.*, Companies Act) clearly qualify the phrase 'shall apply'. The meaning is that the provisions of the Indian Arbitration Act, 1899, except section 2 thereof (which is to be treated as non-existent) shall apply to all arbitrations between companies and persons by force and effect of the Companies Act itself.''

I respectfully agree that section 2 of the Arbitration Act IX of 1899 should be treated as non-existent by reason of sub-section (3) of section 152 of the Companies Act, 1913. In *William Blackburn* v. *John Flavelle*[1] their Lordships approve the following statement of the law,

''If there be any one rule of law clearer than another as to the construction of all statutes and all written instruments (as, for example, sales under powers in deeds and wills) it is this: that where the Legislature or the parties to any instrument have express-

1. (1881) L.R. 6 A.C. 628 (634).

ly authorised one or more particular modes of sale or other dealing with property, such expressions always exclude any other mode, except as specifically authorised.''

I think in construing section 152 and the other sections empowering companies to do certain acts and to act in a certain way, it is important to consider the nature of a limited liability Company. It is purely artificial, being the creature of statute. It is authorised by a statute to hold moneys, to invite the public to subscribe to its funds to deal with those funds and to function in a manner which may fall within the objects of the company. The whole of the legislation relating to companies is designed to protect the public and to confine the actions of the company within certain specified limits. It seems to me unthinkable that a company should be permitted to arbitrate in any way it likes and not according to any rule. I think it was precisely to restrict its rights of arbitration in a certain manner that section 152 of the Companies Act of 1913 was passed. My view is unfortunately not in accordance with that of my learned brothers Somayya and Happell, JJ., which is (at page 492 of (1943) 2 M.L.J.) that ''may by written agreement refer to arbitration in accordance with the Arbitration Act, 1940,'' (1899?) ''means, in our opinion, that if a company wishes to refer to arbitration in accordance with the Arbitration Act it can do so by written agreement; and this carries with it the implication that references to arbitration in accordance with Schedule II, Civil Procedure Code are still open to a company if it does not wish to avail itself of the provisions of the Indian Arbitration Act.'' I accordingly think it necessary to refer the matter to a Full Bench and I would therefore refer the following question:—

''Before the Indian Arbitration Act, 1940, came into force, did section 152 of the Indian Companies Act, 1913, entitle a company to refer a dispute to arbitration at its option either under the Indian Arbitration Act, 1899, or under the Civil Procedure Code, (section 89 and Second Schedule)''.

*Kunhi Raman, J.*—I have had the advantage of perusing the order just pronounced by my learned brother and I wish to add only a few words. *Jhirighat Native Tea Co., Ltd.* v. *Bipul Chandra Gupta,*[1] about the scope of section 152 of the Indian Companies Act, 1913, seems to me, with respect, to be sounder than the view taken on the same point by the Lahore High Court in *Sitaram Balmukund* v. *Punjab National Bank, Ltd.*[2] Since the latter view has been followed by another Bench of this Court in the case reported in *Karnataka Bank, Ltd., Mangalore* v. *Singarayya,*[3] it has become desirable to have the question decided by a Full Bench.

The Indian Arbitration Act, 1940, has now repealed the earlier Act of 1899, which, however, was in force when the present case was decided by the Court below. One of the changes introduced by the Act of 1940 is to repeal section 89 and the whole of Schedule II of the Civil Procedure Code. But in the present case in which a large amount is involved the question as to whether under section 152 of the Indian Companies Act, 1913, a company which refers a dispute to arbitration is of necessity bound to have it done under the Indian Arbitration Act, 1899, is of importance. The proper Court having jurisdiction to pass a decree in terms of the award will, if the Indian Arbitration Act applies, be the District Court. If the second Schedule to the Civil Procedure Code applies, the Subordinate Judge's Court will have jurisdiction in the matter. In my opinion the wording of section 152 (3) of the Indian Companies Act, 1913, makes it clear that it is obligatory on a company which wishes to make a reference to arbitration to follow the provisions of sub-section (1). The Legislature has used the word ''may'' in sub-section (1) since the use of the word ''shall'' would exclude the jurisdiction of Civil Courts and it would become incumbent on companies to resort to arbitration to settle all their disputes. This did not, however, make it discretionary for a company to refer a dispute to arbitration either under the Indian Arbitration Act, 1899, or under the Civil Procedure Code, prior to the enactment of the Indian Arbitration Act, 1940. Moreover, the preamble to the Indian Companies Act, 1913, recites that the Act is intended ''to consolidate and amend the law relating to trading companies ........'' and the question whether this does not indicate that the Act is meant to be exhaustive and to provide for all questions relating to companies including reference of disputes to arbitration deserves consideration in interpreting section 152. I therefore agree to the proposed reference.

In pursuance of the abovesaid Order of Reference, the Judgment* of the Court was delivered by

*The Chief Justice.*—The question referred is whether section 152 of the Indian Companies Act, 1913, before its amendment by the Arbitration Act, 1940, had the effect of confining an arbitration in which a limited liability company was concerned to an arbitration under the Indian Arbitration Act, 1899,

1. I.L.R. (1940) 1 Cal. 358.
2. (1936) I.L.R. 17 Lah. 722 (F.B.).
3. (1943) 2 M.L.J. 489.

*25th January, 1944.

or whether the section left a company free to follow any of the courses contemplated by the Civil Procedure Code as it stood before 1940. Before its repeal sub-section (1) of section 89 of the Code made this provision of law—

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second schedule."

The second schedule provided for an order of reference to arbitration being made in a suit, for an order of reference being passed without any suit being filed and for the case where an arbitration had taken place without the intervention of a Court. In all these cases the Court could pronounce judgment according to the award and pass a decree.

In the present case the Catholic Bank, Ltd., Mangalore, a company registered under the Indian Companies Act, entered into an agreement outside the Court for a reference to arbitration and obtained an award for payment of the sum of Rs. 53,500 with interest. Thereupon the Bank filed an application in the Court of the Subordinate Judge of South Kanara for the execution of the decree. The objection was taken that a company could only embark on arbitration under the terms of the Indian Arbitration Act, 1899 and that consequently the District Court alone had jurisdiction. The contention was upheld by the Subordinate Judge, who followed the judgment of the Calcutta High Court in *Jhirighat Native Tea Co., Ltd.* v. *Bipul Chandra Gupta*,[1] which dissented from the opinion of the Lahore High Court expressed in *Sitaram Balmukund* v. *Punjab National Bank, Ltd.*[2] After the Subordinate Judge's decision, a Bench of this Court (Somayya and Happel, JJ.) in the *Karnataka Bank, Ltd. Mangalore* v. *Singarayya*,[3] indicated preference for the Lahore opinion, but the learned Judges before whom this appeal came in the first instance considered the Calcutta view to be the right one and to avoid further controversy so far as this Court is concerned have made this reference to a Full Bench.

The Lahore High Court held that section 152 of the Indian Companies Act, 1913, did not deprive a company of the advantages of the provisions of the Civil Procedure Code, because it considered that the section was only intended to enable a company to take advantage of the Indian Arbitration Act and not to compel it to proceed under that Act should it decide to refer a dispute to arbitration.

Before the amendment in 1940, sub-sections (1) and (3) of section 152—sub-section (2) has no bearing—read as follows:

"(1). A company may by written agreement refer to arbitration, in accordance with the Indian Arbitration Act, 1899, an existing or future difference between itself and any other company or person.

(2) The provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject matter of the arbitration, shall apply to all arbitrations between companies and persons in pursuance of this Act."

It is common ground that the words "other than those restricting the application of the Act in respect of the subject matter of the arbitration" in sub-section (3) have reference to the restrictions contained in section 2 of the Arbitration Act, 1899. The first clause of that section applied the Act to cases, where, if the subject matter submitted to arbitration were the subject of a suit the suit could whether with leave or otherwise be instituted in a Presidency Town. The second clause of the section contained a proviso empowering the Provincial Government, by notification in the Official Gazette,

1. I.L.R. (1940) 1 Cal. 358.
2. (1936) I.L.R. 17 Lah. 722 (F.B.).
3. (1943) 2 M.L.J. 489.

to declare the Act applicable in any other local area as if it were a Presidency Town. No such notification was issued and therefore the Act so far as its own provisions were concerned only applied to Presidency Towns, but by reason of the insertion of the words "other than those restricting the application of the Act in respect of the subject matter of the arbitration" in sub-section (3) of section 152 of the Companies Act its application, so far as companies were concerned, was made general.

In holding that section 152 was merely an enabling section the Lahore High Court laid stress on the word "may" and considered that if the procedure laid down in the section were applicable the words "in pursuance of this Act" occurring at the end of the sub-section (3) would seem to be wholly redundant. The Court also attached importance to the fact that the Civil Procedure Code itself contained no indication that a company was to be excluded from the benefits of Schedule II. On the other hand the Calcutta High Court considered that section 152 of the Companies Act meant that the provisions of the Indian Arbitration Act, 1899, except section 2 which was to be treated as non-existent, should apply to all arbitrations between companies and persons by the force and effect of the Companies Act itself. The Lahore High Court had, in the opinion of the Calcutta High Court, erroneously read the words "in pursuance of this Act" in sub-section (3) as meaning "in pursuance of sub-section (1)" or the words "in pursuance of this section."

In our judgment the decision of the Calcutta High Court is to be preferred. Section 88 of the Companies Act, 1913, gave a company the same right of entering into a contract as was possessed by a private person. The insertion of section 152 shows that the Legislature intended that companies should be put on a special basis in the matter of arbitration. They were to proceed under the Arbitration Act, the territorial restriction of which, so far as they were concerned, was to be abolished. If this view is right, as we think it is, the word "may" in section 152 must be read as "must". As pointed out by Jessel, M.R., in *Ex parte Stephens*,[1] where there is a special affirmative power given which would not be required because there is a general power it is always to be read to import the negative.

An examination of the provisions of the corresponding sections of the Companies Act, 1882 lends support for the proposition that the Legislature did not intend to put companies on the same basis as persons in reference to arbitration. Section 67 of that Act provided that contracts might be made on behalf of a company in these ways:

(*a*) A contract, which if made between private persons would be by law required to be in writing, and, if made according to English law, to be under seal, might be made on behalf of the company in writing under the common seal of the company.

(*b*) A contract, which if made between private persons would be by law required to be in writing signed by the parties to be charged therewith, might be made on behalf of the Company in writing signed by a person acting under the authority of the company.

(*c*) A contract ,which if made between private persons would by law be valid, although made by parol only and not reduced to writing, might be made by parol by a person on behalf of the company acting under the authority of the company.

The corresponding section to section 152 of the present Act was section 96, which said that a company might from time to time, by writing under its common seal, agree to refer, and might refer, to arbitration any matter whatsoever in dispute between itself and any other company or person. The fact that under the Companies Act, 1882, a company could only refer a dispute to arbitration when it agreed to do so under seal appears to us to be a clear indication that the Legislature at an early stage contemplated companies and persons being placed on different footings.

It follows that we share the opinion of the Calcutta High Court with regard to the effect of the words "in pursuance of this Act" in sub-section (3)

1. (1876) L.R. 3 Ch. 659.

of section 152 of the Indian Companies Act, 1913, and that we can see nothing in the Civil Procedure Code which militates against the acceptance of the section as a mandatory provision of law. On the contrary sub-section (1) of section 89, Civil Procedure Code supports the proposition. It makes the second schedule applicable to references to arbitration only "save in so far as is otherwise provided by the Indian Arbitration Act 1899 or by any other law for the time being in force." Section 152 of the Indian Companies Act, 1913, as it stood before its amendment, in 1940, was another law for the time being in force and therefore was the overriding law so far as companies were concerned.

For these reasons we would answer the question referred by saying that after the enactment of the Indian Companies Act, 1913, and before the Indian Arbitration Act, 1940, came into force a company could only enter into an arbitration under the provisions of the Indian Arbitration Act, 1899, and consequently companies were outside the scope of Schedule II, Civil Procedure Code.

The costs of the reference will be made costs in the appeal.

K.S. *Reference answered.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— MR. JUSTICE BYERS.

S. K. R. A. K. N. Athappa Chettiar (deceased) and others .. *Petitioners**

*v.*

S. K. A. R. K. Somasundaram Chettiar and others .. *Respondents.*

*Civil Procedure Code (V of 1908), section 115—Scope of section 4 of the Indian Partition Act—No application under sections 2 or 4 of the Partition Act—Court has no jurisdiction to impose a sale.*

Section 4 of the Indian Partition Act lays upon the Court the duty of fixing the valuation of the share which the shareholder proposes to buy in, in such manner as it thinks fit and then to order the sale accordingly.

Unless there is an application under sections 2 or 4 of the Indian Partition Act, the Court has no jurisdiction to impose a forced sale upon the members of the family.

Where an application is made under section 4 of the Act, the value of the share to be bought in must be fixed by the Court and cannot be put up to auction.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Sivaganga, dated 18th November, 1941 and made in I.A. No. 562 of 1938 in O.S. No. 16 of 1936.

*B. Sitarama Rao* and *R. Subramania Aiyar* for Petitioners.

*K. V. Sesha Aiyangar* and *N. Karpagavinayagam* for Respondents.

The Court delivered the following

JUDGMENT.—This petition under section 115 of the Code of Civil Procedure arises out of an order passed by the learned Subordinate Judge of Sivaganga, directing the sale of two houses under the following circumstances. The suit was filed for partition by alienees who were strangers to the family and after getting a preliminary decree for the division and separate possession of their share, the learned Subordinate Judge found that the houses were incapable of equitable division and must therefore be sold amongst the sharers.

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*C.R.P. No. 649 of 1942. 3rd November, 1943.

The sale was then held, at which the plaintiffs were permitted to bid and the learned Subordinate Judge then directed that in lieu of taking their shares in the property they were to be paid the proportionate share of the highest bid reached for these two items. It is against this order that some of the members of the family have now come up in revision.

One of the difficulties in the case is the absence of any accurate information as to whether there were formal applications made under section 2 or 4 of the Partition Act. On behalf of the plaintiffs Mr. Sesha Ayyangar denies the existence of any such application and defends the procedure of the lower Court on the ground that it had inherent jurisdiction to sell the property in the interests of the shareholders if it is incapable of equitable division. On behalf of the shareholders Mr. Sitarama Rao, while unable to say whether or not there was a formal application under the Partition Act, suggests that in view of the learned Judge's directions for sale of the property there must necessarily have been an application under section 4.

Let it first be assumed for the purposes of argument that there was an application under section 4 of the Partition Act. In that case the procedure adopted by the learned Subordinate Judge was clearly wrong, because section 4 lays upon the Court the duty of fixing the valuation of the share which the shareholder proposes to buy in. It must be obvious that by holding an auction of the property, of which the plaintiffs were not to be allowed to take possession because it was incapable of equitable division, it would be open to the plaintiffs to force up the value to a prohibitive height, safe in the knowledge that they could never be called upon to pay the price and confident that one-sixth of this price would have to be paid to them by the shareholder concerned in hard cash. Under section 4 it is for the Court to fix the valuation in such manner as it thinks fit and then to order the sale accordingly.

Next, let it be assumed for the purposes of argument that there was no application under section 2 or 4 of the Act, then it is clear from the contents of the Commissioner's report that the Court had no jurisdiction to impose a forced sale upon the members of the family. Although the learned Subordinate Judge came to the conclusion on the 13th August, 1941, in I.A. No. 562 of 1938 that items 3 and 4 were incapable of equitable division, there is the report of the Commissioner dated 21st October, 1940, that he had divided the house property into six equal parts, the details of his division being contained in his report accompanied by a detailed plan. The house is therefore capable of physical division and all that the plaintiffs were entitled to was possession of one share according to lots to be cast. If the members of the family wished to buy out the plaintiff's share, it was for them to apply under section 2 or 4 of the Partition Act and for the learned Subordinate Judge to proceed accordingly.

Therefore, viewed from either aspect, it seems clear that the learned Subordinate Judge had no jurisdiction to hold the sale by auction. If there were an application under section 4, he should have proceeded in accordance with the directions therein contained; if no application were made, then partition must be made in accordance with the report of the Commissioner and there is no jurisdiction to force a sale upon the other members of the family in respect of the shares which they are entitled to hold.

In the result the petition is allowed and the order of the learned Subordinate Judge is set aside and he is directed to dispose of the petition afresh in the light of these observations. Each party will bear his own costs.

V.P.S. *Petition allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Pagolu Achyutaramayya .. *Appellant**

*v.*

Thimmaraju Ramamma .. *Respondent.*

*Madras Debt Conciliation Act (XI of* 1936), *section* 25—*Application for conciliation —Execution sale held without reference to petition—Validity—Time of presentation of petition—Inference regarding.*

When an execution sale came on the judgment-debtor filed a petition before the executing Court stating that he had presented a petition before the Debt Conciliation Board and praying that the sale might be stayed. That petition was dismissed by the Court after observing that the decree-holder's advocate stated that no such petition was filed before the Debt Conciliation Board, that no certificate as to the filing of that petition had been filed and that the District Munsif was convinced that the petition was not a *bona fide* one. The sale having been held the judgment-debtor filed a petition to set aside the sale on the ground that it was held without jurisdiction. It was shown that a petition was presented to the Board on the date of the sale and the person who presented it also filed an affidavit praying for stay of the sale.

*Held,* that in the absence of other evidence it was not possible under the circumstances to infer that the petition preferred to the Debt Conciliation Board was presented subsequent to the knocking of the sale.

*Held, further,* that the execution sale was without jurisdiction as it did not take into account the petition presented to the Board. *Sitarama Reddi* v. *Bilchal Somappa and another,* (1943) 1 M.L.J. 402 followed.

Appeal against the order of the Court of the Subordinate Judge of Bezwada dated 22nd January, 1943, and made in A.S. No. 91 of 1942 (E.A. No. 1581 of 1942 in E. P. No. 337 of 1941 in O.S. No. 210 of 1939, District Munsif Court, Bezwada).

*M. Appa Rao* for Appellant.

*K. Kameswara Rao* for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the order of the learned Subordinate Judge of Bezwada dismissing the appeal filed against the order of the District Munsif of Bezwada dismissing the petition of the judgment-debtor in O.S. No. 210 of 1939 to set aside the sale of his house on the ground that the Court had no jurisdiction to sell the property. On the date on which the sale came on the judgment-debtor, the third defendant in the suit filed a petition before the executing Court that he had presented a petition before the Debt Conciliation Board and praying that the sale may be stayed. That petition was dismissed by the Court after observing that the decree-holder's advocate stated that no such petition was filed before the Debt Conciliation Board, that no certificate as to the filing of that petition had been filed and that the District Munsif was convinced that the petition was not a *bona fide* one. The sale was held. Then this petition was filed to set aside the sale on the ground that it was held without jurisdiction. Two contentions were raised, *viz.,* (1) that the petition to the Debt Conciliation Board was not presented before the sale was held and (2) that even if it was presented it would be of no avail as the debtor was not a person who was depending mainly upon agriculture for his livelihood and a petition by him was not maintainable. The appellant's contention was that he did file a petition before the sale was held and that it is not open to the executing Court to go into the question whether the petition was maintainable by him or not.

On the first point the first Court has not given any finding. But the learned Subordinate Judge in paragraph 3 of his judgment observed that from the available evidence he thought that the sale was knocked down before the presentation of the petition before the Debt Conciliation Board. What

*A.A.A.O. No. 191 of 1943. 2nd February, 1944.

the evidence is he has not referred to. But there is this fact that a petition was filed before the sale was held asking for stay of the sale and in that petition it was stated that the petition had already been filed before the Debt Conciliation Board. That the petition was filed before the Debt Conciliation Board on that day is not disputed before me now. If a petition was presented on the date of the sale and if the person who presented it also filed an affidavit accompanying the petition praying for stay of the sale on the ground that he had presented a petition and when no counter affidavit was filed in that petition, could it be said that that is not enough evidence to show that that petition must have been filed before the sale was knocked down? Admittedly the decree-holder was not present at the time when the petition was filed, for according to him no petition was presented. If no petition had been presented how did the decree-holder come to know about it? In these circumstances, when there was only the affidavit of the debtor before the Court, I am not able to see how the learned Judge came to the conclusion from the available evidence that this petition was presented subsequent to the knocking of the sale. I therefore do not think the finding of the learned Judge could be sustained in the absence of any evidence and in the face of the affidavit of the judgment-debtor.

The only other point for consideration is whether the petition was not maintainable and whether it is a matter that can be gone into by the executing Court. There is absolutely no other material except the deposition received in evidence in the course of the appeal for deciding the question whether the petition was maintainable or not. Even in the affidavit filed by him with the petition for stay the appellant had described himself as one living on his *inam.* It is true he was also a clerk employed in a firm. But we have no evidence as to what his annual expenses come to and what proportion his income as an employee in the firm bears to the annual expenses of his family. From the mere fact that he was a clerk in a firm it is not possible to state that his main means of livelihood may not have been the income from his inam lands.

In these circumstances I do not think on the materials before the Court it has been proved that the petition was not maintainable. Further as pointed out by my learned brother, Horwill, J., in *H. Sitarama Reddi* v. *Bilchal Somappa and another,*[1] if a petition is filed even though information is not given to the executing Court, the sale is one held without jurisdiction and has to be set aside. In these circumstances I find that the sale in question is void as being held without jurisdiction. I set aside the order of the lower Courts and instead allow the petition and set aside the sale, with costs in all the three Courts.

Leave to appeal is refused.

B.V.V. — *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Munshi Chandrakaladhara Row (died) and another .. *Appellants**

*v.*

Tatavarthi Nagapotha Row .. *Respondent.*

*Madras Agriculturists' Relief Act (IV of 1938), section 28—Rules under—Provision for determination on an application of the amount of debt due on a mortgage—Scope—Claim of partial failure of consideration and that by crediting the usufruct and applying Act IV of 1938 the balance of the debt under the mortgage would be entirely discharged—If can be adjudicated on such an application—Madras Act (XV of 1943), section 2—Scope and effect.*

Though the Court acting under the rules framed under section 28 of Madras Act IV of 1938 cannot be required to go into the question of the amount of the debt when the petitioner who seeks the aid of the Court denies the existence of any enforceable debt—

1. (1943) 1 M.L.J. 402.

*A.A.O. No. 170 of 1942. 20th January, 1944.

(See *Subba Rao* v. *Seshayya,* (1942) 2 M.L.J. 551)—the position is somewhat different where the petitioner admits the subsistence of the debt, but says that there is a partial failure of consideration and that payments which ought to have been appropriated to this debt have wrongly been appropriated to some other debt. The Court cannot refuse to adjudicate on such contentions and give a positive determination of the amount due after applying the provisions of the Act to the debt having regard to the findings on such pleas.

In any event, after the passing of Madras Act XV of 1943, the position has been substantially changed. Under section 2 of the Act it is provided that no Court shall entertain a suit by a creditor for the recovery of a debt if the Court having jurisdiction has passed an order under clause (*a*) of sub-section (4) in respect of such debt. Clause (*a*) of sub-section (4) deals with an order declaring the amount due or declaring that the debt has been discharged. Seeing that the creditor is not allowed to file any suit after the decision it follows that any declaration made on the application must deal comprehensively with all matters necessary to be decided before a decree for the debt can be passed for the new Act contemplates the decree being passed on payment of Court-fee in terms of the declaration given as a result of the application. The Court has to take into account any plea of failure of consideration or misapplication of payments.

Appeal against the order of the District Court of Kistna at Chilakalapudi dated the 12th day of September, 1941, and made in O.P. No. 60 of 1940.

*B. V. Subramaniam* for Appellants.

*Ch. Raghava Rao* for Respondent.

The Judgment of the Court was delivered by

*Wadsworth, J.*—The appellant is the legal representative of a mortgagor who applied under the rules framed under section 28 of Madras Act IV of 1938 for the determination of the amount due under the mortgage. The mortgage was peculiar in that it provided that the amount advanced, which included a sum of Rs. 1,592-3-6 due on accounts and certain other advances, should be secured on property already in the possession of the mortgagee under previous transactions, and it provided that the usufruct of the property should go first in discharge of the account debt, secondly in discharge of an earlier mortgage incurred by the mortgagor in favour of the mortgagee's mother, thirdly in discharge of an earlier mortgage in favour of the mortgagee's father, and lastly in discharge of the present mortgage. The petition filed under the rules asserted that the recital in the mortgage about the debt due on the account was fictitious and that the two earlier mortgages in favour of the mother and the father of the mortgagee were not actually subsisting at the time of the present mortgage; so that the whole of the usufruct would necessarily have to go in liquidation of the present mortgage; and he claimed that by crediting this usufruct and by applying Act IV of 1938 to the balance of the debt the debt would be entirely discharged.

The learned District Judge in dealing with this application held that an inquiry into the plea of partial failure of consideration and an inquiry into the subsistence of the two connected mortgages was outside the scope of proceedings under the rules and the learned Judge confined himself to making a hypothetical declaration of the amount that would be due on the debt on the assumption that the recitals in the mortgage document were true and no payments adjusted towards the two earlier mortgages had to be re-adjusted towards the present debt. We have held in *Subba Rao* v. *Seshayya,*[1] that the Court acting under the rules framed under section 28 of the Madras Act IV of 1938 cannot be required to go into the question of the amount of the debt when the petitioner who seeks the aid of the Court denies the existence of any enforceable debt. The position is somewhat different where the petitioner admits the subsistence of the debt, but says that there is a partial failure of consideration and that payments which ought to have been appropriated to this debt have wrongly been appropriated to some other debt. It is difficult to see how the

1. (1942) 2 M.L.J. 551.

Court can refuse to adjudicate on such contentions and to give a positive determination of the amount due after applying the provisions of the Act to the debt having regard to the findings on pleas of this nature.

But whatever be the correct view under the rules subsisting when the learned District Judge made his inquiry, the position has been substantially changed by the passing of Madras Act XV of 1943. Under section 2 of that Act it is provided that no Court shall entertain a suit by a creditor for the recovery of a debt if the Court having jurisdiction has passed an order under clause (*a*) of sub-section (4) in respect of such debt. Clause (*a*) of sub-section (4) deals with an order declaring the amount due or declaring that the debt has been discharged. No doubt the order of the learned District Judge was not passed under this amending Act; but now that this Court is seized of the matter in appeal, the result will be an order under Act IV as amended in 1943; and seeing that the creditor is not allowed to file any suit after the amount due under the debt has been declared, it seems to follow that any declaration now made must deal comprehensively with all matters necessary to be decided before a decree for the debt can be passed, for the new Act contemplates the decree being passed on payment of Court-fee in terms of the declaration given as a result of the application. Having regard to these considerations it seems to us eminently desirable that in these proceedings a complete adjudication should be made of the amount of the debt due from the appellant to the respondent, not merely by applying the provisions of the Act, to hypothetical figures, but by applying those provisions to the actual figures reached after taking into account any plea of failure of consideration or misapplication of payments. The appeal is therefore allowed and the application is remitted for fresh disposal to the lower Court in the light of these remarks. The parties will be at liberty to adduce further evidence. Costs in the appeal will abide the result.

K.S. — *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Meenakshisundaram Chettiar .. *Appellant**

*v.*

Velambal Ammal .. *Respondent.*

*Interpretation of decrees—Award by a layman, appointed arbitrator by the Registrar of Co-operative Societies—Words must be given their plain meaning—Joint decree against principal and surety—Surety a judgment-debtor.*

In interpreting not a decree of Court in which certain words have often a precise technical meaning, but the award of an arbitrator who is a layman, the Court should attempt to give the words of the arbitrator their plain meaning.

Where the award of an arbitrator appointed under the Co-operative Societies Act consisted of three parts, *viz.*, (i) that the defendants 1 to 6 do pay the plaintiff a certain sum of money, (ii) that in default, the mortgaged property specified or a sufficient part thereof should be sold and (iii) that if the sale proceeds be found insufficient, the plaintiff may recover the balance from the defendants personally, on the question whether the judgment-debtor could be arrested only if any sum remained due after the hypothecated properties had been sold,

*Held*, that the plaintiff could not proceed against the defendants personally unless the sale proceeds were insufficient.

*Cheruvalath Kumbanari Velakathala* v. *Theyyatath Karan*, (1914) M.W.N. 497 (*second column*) and *Rajah of Kalahasti* v. *Varadachariar*, (1911) 21 M.L.J. 1036 referred to.

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*A.A.A.O. No. 28 of 1943. 21st January, 1944.

Where a joint decree has been passed against principal and surety their position is no longer that of principal and surety but of joint judgment-debtors.

Appeal against the order of the Court of the Subordinate Judge of Tanjore, dated 13th November, 1942, and made in Appeal Suit No. 188 of 1942, preferred against the order of the Court of the District Munsif of Tanjore, dated 28th November, 1941, and made in E.P. No. 416 of 1941 in A.F. No. 1378 of 1932-33.

*C. V. Nagaraja Sastri* for Appellant.

*T. K. Subramania Pillai* for Respondent.

The Court delivered the following

JUDGMENT.—The respondent is seeking to execute a decree passed by an arbitrator appointed under the Co-operative Societies Act by arresting the judgment-debtor. In the lower appellate Court two reasons were given why execution could not proceed. One was that the judgment-debtor could be arrested only if any sum remained due after the hypothecated properties had been sold. The second was that the decree-holder had done acts which relieved the appellant from his liability as a surety for the debt of his principal. Both these points were decided against the appellant.

The second point may be dealt with very briefly, there really being nothing to add to what was said by the lower appellate Court. We are not, after a joint decree has been passed against principal and surety, any longer dealing with a principal and a surety, but with a joint judgment-debtor.

The award to be executed consists of three parts. The first is that defendants 1 to 6 do pay plaintiff a certain sum of money. The second is that in default the mortgaged property specified or a sufficient part thereof should be sold; and the third is that if the sale proceeds be found insufficient, the plaintiff might recover the balance from the defendants personally or from his or their other properties. No question of the interpretation of the decree was considered by the lower appellate Court; for the argument there seemed to turn on the question whether the procedure laid down under the Co-operative Societies Act applied or the rules of the Civil Procedure Code, the lower appellate Court holding that the rules under the Co-operative Societies Act had to be applied. Both the learned counsel in this Court agree that the Court is only concerned with the interpretation of the decree as it stands, and not with the question which set of rules have to be applied. The question argued here is whether one should regard the first part of the award as an independent remedy available to the decree-holder, or whether it is to be read only with the other two paragraphs. It is clear to my mind that the ordinary meaning to be attached to this award is that the property should be sold in the first instance and that only if some amount thereafter remained due to the decree-holder, could the judgment-debtor be arrested *or* his movable property sold. Mr. Subramania Pillai has drawn my attention to *Cheruvalath Kumbanari Velakathala* v. *Theyyatath Karan,*[1] where the learned Judges say:

> "We are bound by a uniform course of decisions of this Court to hold that where a decree directs the defendants to pay money to the plaintiff within a certain time and sale of mortgaged property in default, the decree is not only an ordinary mortgage decree, but is also a decree for money which may be executed against the other properties of the defendant".

My attention has not been drawn to any decisions which the learned Judges had in mind: and no reason is given in the judgment for the conclusion; but presumably the reason is that the words "that defendant do pay plaintiff" have always meant that the defendants were personally liable for the debt and

1. (1914) M.W.N. 497 (second column).

could be arrested. That the mere use of these words is not however conclusive is indicated by a decision of another Bench of this Court in *Rajah of Kalahasti* v. *Varadachariar*,[1] where one of the learned Judges says:

"A direction that the defendant do pay a certain sum of money, *prima facie*, imposes a personal liability, though no doubt the words are not conclusive of the question. It may be that other clauses of the decree, if read together with such direction, might show that all that was meant by what is *prima facie* a direction was to declare the amount for which the defendant was liable, and the only immediate remedy intented to be given was against the mortgaged property."

The learned Judge then went on to say that it was impossible to construe the decree under their consideration in that way. In the Madras Weekly Notes case the award had apparently only two paragraphs, whereas there are three here, the third paragraph further suggesting that the plaintiff could not proceed against the defendants personally unless the sale proceeds were insufficient. Moreover, we are not here interpreting a decree of Court, in which certain words have often a precise technical meaning, but an award by a layman, the honorary arbitrator appointed by the Registrar of Co-operative Societies, to whose words the Court should attempt to give their plain meaning.

The appeal is therefore allowed and the execution petition dismissed; but in view of the many contentions raised by the judgment-debtor which are without substance, there will be no order as to costs.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Commissioner of Income-tax .. *Applicant**

*v.*

Sri S.N.A.S.A. Annamalai Chettiar, Karaikudi .. *Respondent.*

*Income-tax Act (XI of* 1922), *section* 4 *(I)* (b) *(iii)—Scope—Joint family owning business in Federated Malay States—Partition allotting to the assessee, a co-parcener, that business with the profits accrued till date of partition* (28—3—1939)*—Assessee bringing into British India between 28th March,* 1939 *and 12th April,* 1939, *portion of the accumulated profits—Liability to income-tax under section* 4 *(I)* (b) *(iii).*

On a partition on the 28th March, 1939, the assessee a co-parcener in a Joint Hindu family received as his share of the family assets the business which the family had carried on in the Federated Malay States and the profits of that business that had accrued from 1st April, 1933, to the date of partition. Between 28th March, 1939, and 12th Aprl, 1939, the assessee brought to British India Rs. 40,742 of the accumulated profits.

*Held,* that this profit accrued to the assessee by reason of partition arrangement and as he brought them into British India he was liable under section 4 (1) (*b*) (iii) of the Income-tax Act to pay tax on this amount. It cannot be said that as the profits had been earned by the joint family, the assessee could not be assessed in respect of them.

Case referred to the High Court by the Income-tax Appellate Tribunal, Calcutta Bench at Bombay, under section 66 (1) of the Indian Income-tax Act, 1922, (Act XI of 1922) in Application No. 66 R.A. No. 3|Madras, of 1943-44 on its file.

*K. V. Sesha Aiyangar* for the Applicant.

*P. R. Srinivasan* for the Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—In the statement of the case made by the Appellate Tribunal it is suggested that the Commissioner of Income-tax has misunder-

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1. (1911) 21 M.L.J. 1036.

*Case Referred No. 43 of 1943. 25th February, 1944.

stood the findings of fact arrived at by the Tribunal and stated in its order of the 9th February, 1943. We do not think that there has been any misapprehension on the part of the Commissioner, but in any event the facts are clear.

Until the 28th March, 1939, the assessee was joint with his father. The family carried on a money lending business in the Federated Malay States. On separation, the assessee received as his share of the family assets the business which the family had carried on in the Federated Malay States. Between the 1st April, 1933, and the date of partition this business had earned considerable profits, all of which accrued to the assessee under the partition. Between the 28th March, 1939, and the 12th April, 1939, the assessee brought to British India Rs. 40,742 of the acumulated profits and the Income-tax Officer decided that he was liable under section 4 (1) (*b*) (iii) of the Income-tax Act to pay the tax on this amount. The Appellate Assistant Cimmissioner disagreed with the Income-tax Officer and held that the assessee was not liable. The Appellate Tribunal agreed with the Appellate Assistant Commissioner. At the request of the Commissioner of Income-tax, the Tribunal has referred for the opinion of this Court the following question:—

"Whether in the circumstances of the case the respondent is liable on the remittance of a sum of Rs. 40,742 brought by him into British India during the accounting year."

Section 4 (1) (*b*) (*iii*) reads as follows:

"Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which having accrued or arisen to him without British India before the beginning of such year and after the 1st April, 1933, are brought into or received in British India by him during such year."

In accepting the case for the assessee, the Tribunal laid stress on the word "him" and considered that as these profits had been earned by the joint family, he could not be assessed in respect of them. We consider that this is not a correct reading of the section. Under it a person is liable to pay the tax on income from whatever source derived which has accrued to him after the 1st April, 1933, and has been brought by him into British India. It is true that the profits were actually earned by the joint family, a different entity for the purpose of taxation, but on the 28th March, 1939, the assessee acquired the business and all the profits which had been earned between the 1st April, 1933, and that date. According to the Oxford dictionary a primary meaning of the word "accrue" is "to come by way of addition or increase, or as an accession or advantage." By reason of the arrangement with his father the assessee instead of being a sharer in the business became the absolute owner thereof. Thereby the profits accrued to him in his own right and it was he who brought them into British India. The acceptance of the assessee's interpretation would mean, as Mr. Sesha Aiyengar has pointed out, that the tax could never be collected on profits earned by a person resident in this country but trading abroad if he transferred his profits to another before they were brought into British India. We cannot accept such a construction. We hold that the profits accrued to the assessee within the meaning of the section and as he brought them into British India he must pay the tax on them.

We answer the question by stating that the respondent is liable to pay the tax on the sum of Rs. 40,742 brought by him into British India during the accounting year.

The Commissioner has succeeded and is entitled to his costs, Rs. 250.

K. S. — *Reference answered.*

# [THE FEDERAL COURT OF INDIA.]

(On appeal from the High Courts of Allahabad, Madras, Nagpur and Patna.)

PRESENT:—SIR PATRICK SPENS, *Chief Justice,* SIR S. VARADACHARIAR AND SIR MOHAMMAD ZAFRULLA KHAN, JJ.

Piare Dusadh and others .. *Appellants**

*v.*

Emperor .. *Respondent.*

*Special Criminal Courts (Repeal) Ordinance (XIX of 1943), section 3 (1)—Validity of—If retrospective—Authorisation by the legislative lists—Absence of words like 'validation' or 'confirmation', if material—Purpose of section 3 (1)—Scope and extent of validity given to sentences by section 3 (1)—Validation by subsequent legislation—Ordinance, if an attempt to do indirectly what could not be done directly—Ordinance, if an exercise of judicial power—Scope and effect of section 102 (1), Constitution Act—'Trial'—Meaning—Distinction between cases falling under section 3 (1) and section 4 of the Ordinance—Procedure in cases falling under section 8 (a) and (b) of Ordinance II of 1942—Cases of death sentences, if fall under section 4 of Ordinance XIX of 1943—Section 4 when can be invoked—Death sentence—Long delay in execution—Power of Federal Court to allow appeal in regard to the death sentence—Criminal trial—Evidence—Reliance on parts of the evidence of a witness found to be unreliable—Propriety.*

Section 3 (1) of Ordinance XIX of 1943 confers validity and full effectiveness on sentences passed by Special Courts functioning under the Special Criminal Courts Ordinance (II of 1942), and it is not *ultra vires* the Governor-General.

It is no more retrospective in its operation than section 3 of Ordinance XIV of 1943 which has been held to be valid.

The subject-matter of the Ordinance is covered by the expression 'administration of justice' in entry No. 1 of List II and the expression 'Criminal Procedure' in entry No. 2 of List III in the Seventh Schedule, Constitution Act.

The absence of the use of the familiar words like 'validation' or 'confirmation' in section 3 (1) is immaterial inasmuch as the question has to be determined by a consideration of the words actually used and not by a speculation as to why other words had not been used.

The purpose of section 3 (1) was to indicate not merely the forum but also the nature and extent of the relief to be had.

As sub-section (2) gives the right of appeal and the power of revision only on the hypothetical footing that the trial was held in accordance with the Criminal Procedure Code and by a Court having competent jurisdiction, the appellate or revisional authority cannot ignore this basic postulate and give relief on the very ground that the trial had not been held under the Code or before a Court exercising competent jurisdiction under the Code. If section 3 (1) gives any validity at all to the sentences that had been passed by the Special Courts, there is nothing to limit such validity up to the time when the sentences are appealed against.

Nothing turns on the fact that section 3 (1) seeks to give validity only to the sentence and not to the conviction, because the section requires the sentence to be treated as one passed by a competent Court at a proper trial and on this footing no separate provision referring to the conviction was necessary.

The principle of validation by subsequent legislation is quite as applicable to judicial as to ministerial proceedings.

In regard to Ordinance XIX of 1943 no question arises of the legislating authority attempting to do indirectly what it could not do directly.

What the ordinance has attempted to do in this case cannot be said to amount to an exercise of judicial power.

There is no basis for the contention that under the terms of section 102 (1), Constitution Act, the legislature could make laws only "for a province", that is, separately for each province and not for a number of provinces together. If the central authority can make laws for each of the provinces there is no principle in insisting that even when a uniform law has to be enacted for each of the several provinces, there can be no single enactment, but that there must be as many enactments as there are provinces.

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*Criminal Appeals Nos. 35 to 47, 49 to 54 of 1943. 1st December, 1943.

The words of section 102 do not justify any limitation on the power of the central legislature to encroach on provincial subject only in respect of matters necessitated by the war and not in respect of subjects relating to internal disturbance when a proclamation of emergency under that section refers only to a threat 'by war'.

The fact that the provisions of the ordinance were hardly likely to conduce to peace and good Government and were not therefore authorised by section 72 of Schedule 9, Constitution Act, is not a matter for Courts to investigate.

The meaning of the word 'trial' must largely depend upon the context and the scheme of the enactment in which it occurs. In the context in which it occurs in Ordinance XIX of 1943 it must comprise all stages of the proceeding, including the inposition of the sentence.

A contradistinction is made by the ordinance between cases in which a sentence had been passed by the Special Courts and cases in which no such sentence had been passed, the former falling under section 3 (1) and the latter under section 4. If it should be assumed that that the two categories might not be exhaustive and cases might be conceived which even while not falling under section 4 might not fall under section 3 (1), the result would only be that the proceedings in such cases would be void and the accused would have to be retried before the regular Courts.

The cases which are dealt with by clauses (*a*) and (*b*) of section 8 of Ordinance II of 1942 stand on a special footing. But when once the case is submitted for review there is no difference in legal position between cases falling under clause (*a*) and cases falling under clause (*b*). The proceeding against the accused in such cases is not to be regarded as complete till after the review is over. Hence in all cases falling under section 8 (*a*) and in all cases where references had been made by the special Judge under section 8 (*b*) the accused will have to be tried under section 4 of the Ordinance XIX of 1943 unless the reviewing Judge, acting under the Special Criminal Courts Ordinance, had given his decision before the new Ordinance came into operation. The possibility that the High Court as a Court of appeal or acting as a confirming Court under Chapter 27, Criminal Procedure Code, may consider or confirm the sentence will not suffice to bring this special class of cases under section 3 (1) of the new ordinance or take them out of the operation of section 4.

Death sentences, no doubt, cannot be executed until confirmed by the High Court. But there is nothing to prevent the Judicial Officer who passed the sentences or the Sessions Judge for the time being referring them for confirmation to the High Court.

Such cases cannot be treated as falling under section 4 even after they had been dealt with under section 8 of the Ordinance II of 1942. Section 4 of Ordinance XIX of 1943 can be invoked only in cases where the trial before the Special Courts had not concluded. The High Court as such acting under Criminal Procedure Code cannot be spoken as a 'special Court' within the meaning of the above provision.

The Federal Court has power, where there has been inordinate delay in executing death sentences in cases which come before it to allow the appeal in so far as the death sentence is concerned and substitute a sentence of transportation for life on account of the time factor alone however right the death sentence was at the time when it was originally imposed. But this is a jurisdiction which very closely entrenches on the powers and duties of the executive in regard to sentences imposed by Courts and one which any Court should be slow to exercise.

Once a witness has been found to be wholly unreliable it is unsafe to place any reliance upon any part of his testimony. It should not be open to the prosecution to pick out a bit here and a bit there from the evidence of a witness whom they themselves are not willing to accept as a witness of truth, and to use these salvaged bits, from testimony which is otherwise contaminated, to bolster up their case against particular accused persons.

*Sardar Raghbir Singh,* Advocate, Federal Court, instructed by *S. Ranjit Singh Narula,* Agent (in 35, 36 and 37); *S. Raghbir Singh,* Advocate, Federal Court (*Raghunath Jha,* Advocate, Federal Court, with him), instructed by *Gurudayal Sahay,* Agent (in 38); *T. K. Prasad,* Advocate, Federal Court, instructed by *S. Ranjit Singh Narula,* Agent (in 39, 50 and 52); *A. C. Sinha,* Advocate, Federal Court, instructed by *Gurudayal Sahay,* Agent (in 40 and 42); *Bhabananda Mukerjee,* Advocate, Federal Court (in 41); *R. N. Padhye,* Senior Advocate, Federal Court (*Ramditta Mall* and *R. K. Manohar,* Advocates, Federal Court, and *G. G. Ghate,* Advocate, Nagpur High Court, with him), instructed by *Naunit Lal Chitkara,* Agent (in 43, 44 and 45); *J. P. Dwiveda,* Senior Advocate, Federal Court (*Ch. Ramditta Mal,* Advocate, Federal Court, with him), instructed by *Naunit Lal Chitkara,* Agent (in 46); *S. Raghbir Singh,* Advocate, Federal Court (for *K. K. Raizada,* Advocate, Federal Court), in-

structed by *Tarachand Brijmohanlal*, Agent (in 47) ; *S. Raghbir Singh*, Advocate, Federal Court, instructed by *Radhe Rawan Bhargava*, Agent (in 53) and *Harish Chandra*, Senior Advocate, Federal Court (*R. K. Manohar*, Advocate, Federal Court, with him), instructed by *Naunit Lal Chitkara*, Agent (in 54), for Appellants.

*Mahabir Prasad*, Advocate-General of Bihar (*Yasin Yunus*, Advocate, Federal Court, with him), instructed by *S. P. Verma*, Agent (in 35 to 42, and 50 to 52) ; *Hidayat Ullah*, Advocate-General of C.P. and Berar (*Kaushalendra Rao*, Advocate, Federal Court, with him), instructed by *B. Banerji*, Agent (in 43 to 46) ; *Dr. Narain Prasad Asthana*, Advocate-General of the United Provinces (*Baijnath Sahai*, Advocate, Federal Court, with him), instructed by *Sumair Chand Jain Baizada*, Agent (in 47, 53 and 54) and *Sir Alladi Krishnaswami Ayyar*, Advocate-General of Madras (*N. Rajagopala Iyengar*, Advocate, Federal Court, with him), instructed by *Ganpat Rai*, Agent (in 49), for the Crown.

*Sir Brojendra Mitter*, Advocate-General of India (*H. K. Bose*, Advocate, Federal Court, with him), instructed by *K. Y. Bhandarkar*, Agent; *Sir Alladi Krishnaswami Ayyar*, Advocate-General of Madras (*N. Rajagopala Iyengar* Advocate, Federal Court, with him), instructed by *Ganpat Rai*, Agent and *N. P. Engineer*, Advocate-General, Bombay (*M. M. Desai*, Advocate, Federal Court, with him), instructed by *B. Banerji*, Agent, appeared in response to notices issued under Order 36, rule 1 of the Federal Court Rules, 1942.

The Judgment of the Court was delivered by

*The Chief Justice*.—These appeals (from judgments of different High Courts) were heard together, as they raised common questions of law. The appellants had been convicted by Courts functioning under the Special Criminal Courts Ordinance (Ordinance II of 1942). On 4th June, 1943, this Court (by a majority) held that the Courts constituted under that Ordinance had not been duly invested with jurisdiction, in view of the nature of the provisions contained in sections 5, 10 and 16 of that Ordinance. The next day, the Governor-General made and promulgated another Ordinance (Ordinance XIX of 1943) whereby Ordinance II of 1942 was repealed and certain provisions (to be referred to presently in detail) were made in respect of sentences which had been passed by the special Courts and in respect of cases which were pending before them on that date. By sub-section (2) of section 3 of the new Ordinance, a right of appeal against sentences which had already been passed by the special Courts was given and appeals were accordingly preferred to the High Court in some cases. In certain other cases, applications for a writ in the nature of *habeas corpus* were made. In both sets of cases, it was contended on behalf of the accused that the new Ordinance did not, and in any event could not, give validity to the sentences which had been passed by the special Courts, and it was claimed that the sentences should be treated as void or set aside without any examination of the merits of the case, and that the accused should, if necessary, be directed to be tried by the ordinary criminal Courts in due course of law. The various High Courts which had to deal with the cases that have now come up before us declined to accede to this contention, though in the Allahabad High Court one learned Judge, (Bajpai, J.), dissented. The *habeas corpus* applications were dismissed and in some instances the appeals were also dismissed on the merits. In the cases from Nagpur, the High Court pronounced a preliminary judgment in the appeals, overruling the appellants' contentions on the points of law above referred to and gave a certificate under section 205, Constitution Act, even before the appeals had been finally disposed of. It may be a question whether it is proper to entertain an appeal merely against the preliminary judgment. It may also be a question whether the

validity of Ordinance XIX of 1943 can be challenged in an appeal preferred under and by virtue of the Ordinance itself. Such objections were however not raised by counsel for the Crown and as the points of law had in any event to be decided in the *habeas corpus* cases, we permitted the questions of law to be argued on behalf of all the appellants. It may be mentioned that among the High Courts whose decisions are not directly now before us on appeal but which we have had to consider, the Bombay High Court upheld the validity of the Ordinance and placed on it the same interpretation as had been adopted by the High Courts at Allahabad, Madras, Nagpur and Patna. In the Calcutta High Court, two learned Judges (Derbyshire, C. J. and Khundkar, J.) placed the narrower interpretation on the impugned provision of the Ordinance rather than hold it to be invalid; Sen, J., held the Ordinance to be invalid.

It will be convenient to set out here the material provisions of the new Ordinance. Section 2 repealed the earlier Ordinance and section 5 provided an indemnity for all officers, judicial or executive, in respect of what they had done under the repealed Ordinance. Section 4 provided that

"Where the trial of any case pending before a Court constituted under the said Ordinance has not concluded before the date of the commencement of this Ordinance, the proceedings of such Court in the case shall be void and the case shall be deemed to be transferred"

to the ordinary criminal Courts for enquiry or trial in accordance with the Code of Criminal Procedure. Section 3 is in the following terms:

"3. *Confirmation and continuance, subject to appeal, of sentences.*—(1) Any sentence passed by a Special Judge, a Special Magistrate or a Summary Court in exercise of jurisdiction conferred or purporting to have been conferred by or under the said Ordinance shall have effect, and subject to the succeeding provisions of this section shall continue to have effect, as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure, 1898 (V of 1898), by a Sessions Judge, an Assistant Sessions Judge or a Magistrate of the first class respectively, exercising competent jurisdiction under the said Code.

(2) Notwithstanding anything contained in any other law, any such sentence as is referred to in sub-section (1) shall, whether or not the proceedings in which the sentence was passed were submitted for review under section 8, and whether or not the sentence was the subject of an appeal under section 13 or section 19, of the said Ordinance, be subject to such rights of appeal as would have accrued, and to such powers of revision as would have been exercisable under the said Code if the sentence had at a trial so held been passed on the date of the commencement of this Ordinance.

(3) Where any such sentence as aforesaid has been altered in the course of review or on appeal under the said Ordinance, the sentence as so altered shall for the purposes of this section be deemed to have been passed by the Court which passed the original sentence."

Two lines of argument have been advanced on behalf of the accused: first, it was said that on a reasonable construction of all the provisions of Ordinance XIX, it could not have been intended to, and did not, in fact, give validity to the sentences passed by the special Courts, but only gave them a kind of provisional regularity of existence till they were brought before a Court of appeal or revision by whom they were expected to be immediately set aside on the ground that they had been passed without jurisdiction. Secondly, it was contended that if the Ordinance sought to give validity to those sentences, it was beyond the competence of the Governor-General to enact it. To appreciate and assess the force of these contentions, it is necessary briefly to advert to the provisions of Ordinance II of 1942 and to the precise terms of the judgment pronounced by this Court in relation to their operation. The Ordinance was promulgated under section 72 of Schedule 9, Constitution Act which empowers the Governor-General "in cases of emergency" to make and promulgate Ordinances for the peace and good government of British India or any part thereof. The Ordinance accordingly recit-

ed that an emergency had arisen which made it necessary to provide for the setting up of special criminal Courts. Sub-section (3) of section 1, however, enacted that the Ordinance should come into force in any Province only if the Provincial Government (being satisfied of the existence of an emergency arising from a hostile attack, etc.), should by notification declare it to be in force in the Province. This way of framing the Ordinance gave rise to a contention that it had not been enacted in accordance with and in circumstances contemplated by section 72. This point was left open in the previous judgment of this Court. The Ordinance proceeded to empower the Provincial Governments to constitute certain classes of special Courts, defined the classes of persons who could be appointed to those Courts, specified the sentences which each of those Courts was authorised to impose, prescribed certain special rules of procedure for the conduct of trials before those Courts and to that extent excluded the application of the provisions of the Code of Criminal Procedure. It also made provision for appeals in certain classes of cases and a special provision for what is spoken of as "review" in certain other cases and completely excluded the jurisdiction of the High Court either as a Court of appeal or revision or as a Court exercising powers under sections 491 or section 526, Criminal Procedure Code. As the Courts created under the Code of Criminal Procedure continued to function alongside of these special Courts, an attempt was made by sections 5, 10 and 16 of the Ordinance to define the cases or classes of cases that should be tried by the special Courts under the Ordinance and not by the ordinary Courts in the ordinary way. It was enacted that they should try such offences or classes of offences or such cases or classes of cases as the Provincial Government or certain executive officers may, by general or special order in writing, direct.

The validity of Ordinance II of 1942 and the legality of sentences passed by Courts functioning under that Ordinance were questioned before all the High Courts and all but the Calcutta High Court held the Ordinance to be valid and the sentences to be legal. The Calcutta High Court however took a different view and directed the release of persons who had been sentenced by the special Courts subject of course to their liability to be tried before the ordinary Courts. It was on an appeal by the Crown against this judgment of the Calcutta High Court that the matter came before this Court in May-June, 1943. This Court (by a majority judgment) held that so long as the Code of Criminal Procedure had not been repealed or validly and effectively excluded, a trial for any crime could only be held by a Court constituted under the Code and in accordance with the procedure therein prescribed. It further held that it was only by a legislative provision that the Courts constituted under the Ordinance could be invested with jurisdiction to hold a criminal trial, and that sections 5, 10 and 16 which left it entirely to the executive authorities to determine what cases should be tried by the regular Courts and by the special Courts respectively, were not valid legislative provisions and that they were accordingly inoperative either to divest the regular criminal Courts of their jurisdiction or to invest the special Courts with jurisdiction. It also pointed out that the powers of the High Court were only taken away by the executive orders under sections 5, 10 and 16 and that this was not permissible in view of section 223, Constitution Act. It was, however, expressly stated in that judgment that there could be no suggestion that the Ordinance was *ultra vires* the Governor-General on the ground that its subject-matter lay outside his Ordinance-making powers. There could be no doubt that by a properly framed Ordinance the Governor-General could have constituted special Courts, invested them with jurisdiction to try specified cases or classes of cases and prescribed the procedure to be followed by them in the trial of such cases even to the exclusion of material provisions of the Code of Criminal Procedure. Whatever opinion might be held as to the expediency of curtailing the safeguards enacted by the Code to ensure a fair trial, no doubt could

be cast upon the competence of the Ordinance-making authority to restrict or even remove any of these safeguards: see *Riel* v. *The Queen*.[1]

The arguments now urged before us on behalf of the appellants were based on two assumptions, (*i*) that Ordinance XIX of 1943 had been enacted on the admitted footing that Ordinance II of 1942 was void and inoperative and (*ii*) that the new Ordinance attempted to do something which this Court had held that the Ordinance-making authority had no power to do. Neither of these assumptions seems to us to be justified. The situation as it stood on 5th June, 1943, was as follows: The Calcutta High Court and two Judges of this Court had held that sections 5, 10 and 16 of the Ordinance were not the proper way of investing the special Courts with jurisdiction. All the other High Courts in India and one Judge of this Court had taken a different view and this Court had granted leave to the Government to take the matter on appeal to His Majesty in Council. The Government had however to make immediate provision for the numerous cases which had before that date been decided by the special Courts in the various Provinces and in respect of the cases which were at the time pending before those Courts. It would have been scarcely reasonable to keep the whole position problematical till the matter could be decided by the Judicial Committee. It must have seemed equally unreasonable to ignore the judgment of this Court. A solution in the nature of a compromise between the two extreme positions seems to have been thought to be the best in the circumstances. As regards pending cases, the best that could be done in the light of this Court's judgment was to direct them to be tried by the regular Courts. It would no doubt have been possible to continue the special Courts by reframing sections 5, 10 and 16; but this Court had also strongly commented on the provisions excluding the jurisdiction of the High Court. As regards cases where sentences had already been passed by the special Courts, it would have been a serious demand on public time, not to speak of public funds, to think of the retrial of all the accused who had been thus sentenced, as their number must have been very large. Nor could it be assumed that it would in all cases have been to the interest of the accused themselves to be retried, if they could in some other way be given an opportunity of showing that their conviction was not justified. In view of this Court's observations on the policy of excluding the High Court's jurisdiction, it was apparently felt that the best thing to do in the circumstances was to maintain the convictions, but to allow them to be questioned by way of appeal and revision as provided by the Code of Criminal Procedure. Whether it was competent to the Ordinance-making authority to make these provisions or not is not the question, when we have to interpret the provisions of the Ordinance. It may be that when there are two possible constructions, one of which will make the enactment void and the other give it some effect, the latter may have to be preferred, though it may not wholly achieve the purpose of the framers. But in the view that we take on the question of the validity of the Ordinance, no such difficulty arises in the present case. It is not right to assume that Ordinance XIX admitted that Ordinance II of 1942 was void. On that assumption, even its formal repeal would not have been necessary, further, it is not easy to reconcile the provisions of sub-sections (1) and (2) of section 3 with that assumption. Even section 4, which declares pending trials before the special Courts void, does not necessarily import that the previous Ordinance was void, it only shows that Government preferred to have the pending cases tried by the regular Courts rather than hold them up till the question of the operativeness of Ordinance II of 1942 was decided by the Privy Council.

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1. (1885) 10 A.C. 675.

It was strongly insisted that sub-section (1) of section 3 did not use familiar words like "validation" or "confirmation," though the word "confirmation" is used in the heading. The question has however to be determined by a consideration of the words actually used and not by speculation as to why other words had not been used. It had to be admitted on behalf of the accused that some kind of operativeness had been given by section 3 (1) to the sentences that had been passed by the special Courts, but it was said that this was only to the extent required to make proceedings by way of appeal or revision possible. And, as the formality of an appeal or revision need not have been insisted on if the Legislature had proceeded on the assumption that the sentences were void, it was suggested that it must have been the intention to leave it to the convicted persons either to acquiesce in the sentences or avail themselves of the opportunity given by the Ordinance to get the sentences set aside. It was explained that the cases dealt with under section 3 (1) were not assimilated to those dealt with by section 4, because an accused person who had already been convicted might in some cases prefer to undergo the sentence that had been imposed upon him rather than face a retrial which would be the result if the sentence had been declared void as one passed by a Court which had no jurisdiction. It was also said that having regard to the disabilities imposed on the accused at a trial by the special Courts, it would not be fair to assume that the Ordinance-making authority intended to confirm sentences passed at such a trial or believed that adequate justice would be done to the accused in such cases merely by giving them a right of appeal or revision on the record as it stood. We are not satisfied that there is much force in these arguments. In our opinion, they do not give due effect to the language of sub-sections (1) and (2) of section 3.

Sub-section (1) of section 3 requires the sentence to be treated as if (1) "the trial at which it was passed had been held in accordance with the Code of Criminal Procedure," (2) by an officer "exercising competent jurisdiction under the said Code." It is obvious that these two groups of words were employed for the purpose of meeting the two requirements insisted on by this Court in the previous judgment, namely, that so long as the Criminal Procedure Code had not been effectively excluded, the trial must be held in accordance with the Code and by Courts having jurisdiction under the Code. The suggestion that they might have been put in to indicate the forum for the appeal or to indicate the classes of cases where remedies should be sought by appeal and revision respectively is unconvincing. The purpose would have been achieved even by the remaining words found in the section, namely, as if "they had been passed by a Sessions Judge, an Assistant Sessions Judge or a Magistrate of the First Class respectively." That the purpose of this section was to indicate not merely the forum but also the nature and extent of the relief to be had is made clear by sub-section (2) which subjects the sentence "to such rights of appeal as would have accrued and to such powers of revision as would have been exercisable under the Code" and then repeats the words "if the sentence had at a trial so held been passed." "At a trial so held" obviously means, as set out in sub-section (1), a trial held in accordance with the Code and by a Court having competent jurisdiction under the Code. As sub-section (2) gives the right of appeal and the power of revision only on this hypothetical footing, the appellate or revisional authority cannot ignore this basic postulate and give relief on the very ground that the trial had not been held under the Code or before a Court exercising competent jurisdiction under the Code. If section 3 (1) gives any validity at all to the sentences that had been passed by the special Courts, there is nothing to limit such validity up to the time that the sentences are appealed against. As for the argument based on the improbability of an intention to confirm sentences passed at trials which were characterised as unfair to the accused, it seems to us incorrect to assume that the authority which enacted Ordinance XIX would have thought that the procedure prescribed by itself in Ordinance II of 1942 was not in the

circumstances sufficiently fair to the accused. It might well have thought that any hardship even on this score would be remedied by allowing the right of appeal or revision. It was only reasonable to expect that if the appellate or revisional authority found reason to think on going into the merits that the accused had been prejudiced by the nature of the trial, it would set things right. But this is different from saying that the appellate or revisional authority should automatically set aside the sentence merely on the ground that the accused had not been tried in accordance with the Code. It has been suggested that the right of appeal would in the circumstances be illusory. We are by no means satisfied that that would be so. We see no justification for importing a fictitious or notional "trial by jury" and on that assumption limiting the powers of the appellate Court. Even this possible doubt has been removed by Ordinance XXXII of 1943, which allows a right of appeal both on questions of fact and on questions of law. In any event, questions of fairness or policy are not matters which the Court can take into consideration when the language of the enactment leaves little or no room for doubt.

It has been further contended that as section 4 proceeds on the footing that the trials before the special Courts were void, consistency requires that section 3 also must be interpreted on the same assumption. It was even said that any other view would make the provisions of the Ordinance illogical and self-contradictory. It is difficult to follow this argument. It seems to us that on this basis there would have been no need to make separate provisions for the two classes of cases respectively dealt with by sections 3 and 4. Even section 4 cannot be said to have proceeded on the assumption that the trials before the special Courts were void. On the principle embodied in section 6 (e), General Clauses Act, the result of the repeal of an enactment on cases pending at the time of the repeal would be that they would continue as if the enactment had not been repealed. But this is subject to the qualification that the repealing enactment contains no provision or indication to the contrary. It was open to the Government to insist that in spite of the decision of this Court on the last occasion, cases pending before the special Courts at the time should continue to be tried before them, in the expectation that the Judicial Committee might take a different view as to the operation of Ordinance II of 1942. This would have been the position even after the repeal, if the matter had been allowed to rest upon section 6 (e), General Clauses Act. But apparently as the Government were not prepared to adopt that attitude, they have enacted section 4 in its present terms. As already explained, there is sufficient reason for making a distinction between cases dealt with by section 3 and cases dealt with by section 4 and there is no illogicality or contradiction involved in such distinction. A point has been made that section 3 (1) seeks to give validity only to the sentence and not to the conviction. Nothing turns on this, because the section requires the sentence to be treated as one passed by a competent Court at a proper trial. On this footing no separate provision referring to the "conviction" was necessary.

In arguing the question as to the validity of the Ordinance, counsel for the accused recognised that the principle of validation by subsequent legislation was quite as applicable to judicial as to ministerial proceedings. This is expressly so stated in the very passage on which they relied from Cooley's "Constitutional Limitations" Edition 8, page 205 (see also pages 773-776). They laid stress on the author's statement as to the limitations on that power and contended (1) that the Ordinance had sought to give validity to what the Ordinance-making authority could not have authorised even by antecedent legislation; (2) that while such legislation might seek to aid and support judicial proceedings, the Legislature could not under the guise of legislation be permitted to exercise judicial power, and (3) that it was not competent to the Legislature by retrospective legislation to make valid any proceedings which had been held in the

Courts, but which were void for want of jurisdiction over the parties. The first of these limitations is without doubt recognised in the English law; *see* per Willes, J., in *Eyre* v. *Phillips*[1]. In support of limitations (2) and (3), Cooley cites the decisions in *McDaniel* v. *Correll*[2] and *Denny* v. *Mattoon*[3]; see also *Pryor* v. *Downey*[4].

The argument with reference to the first limitation was based on the assumption that Ordinance XIX sought to validate the very delegation of power to the executive which was attempted by sections 5, 10 and 16 of Ordinance II of 1942 and which, it was held by this Court in the previous case, could not be validly done. This assumption is, in our opinion, unwarranted. The expression "what could have been antecedently authorised" implies that this had not as a matter of fact been done previously. In the circumstances of this case that could not be said of the delegation of power to the executive authorities, because that had, in fact, been done by sections 5, 10 and 16 of the previous Ordinance. It is the acts of the special Courts in trying cases and passing sentences as they had done that had not in fact been duly authorised on the previous occasion and it is those acts that are now sought to be declared valid. The enquiry under this head must therefore be whether the Ordinance-making authority had power (if only it had properly exercised such power) to create these special Courts and authorise them to try cases and pass sentences. On the existence of such power no doubt was cast by this Court on the previous occasion and it has not been denied even by counsel for the accused in these cases. There is accordingly no substance in this objection. In this view, no question arises of the legislating authority attempting to do indirectly what it could not do directly. We were in this connexion invited to express a definite opinion on the point which we had left open in *Emperor* v. *Benoari Lal Sarma*,[5] *viz.*, whether Ordinance II of 1942 was promulgated on a declaration of emergency of the kind contemplated by section 72 of Schedule 9. We do not see that it would make any difference to the decision of the present question even if Ordinance II of 1942 should be held to have been inoperative on that ground; that would not imply the absence of power in the Governor-General, but would only involve the conclusion that the power had not been properly exercised on the previous occasion.

Turning to the other two objections referred to above, it is necessary to consider how far they rest upon peculiarities of the American Constitution. As a general proposition, it may be true enough to say that the legislative function belongs to the Legislature and the judicial function to the Judiciary. Such differentiation of functions and distribution of powers are in a sense part of the Indian law as of the American law. But an examination of the American authorities will show that the development of the results of this distribution in America has been influenced not merely by the simple fact of the distribution of functions, but by the asumption that the constitution was intended to reproduce the provision that had already existed in many of the State Constitutions, positively forbidding the Legislature from exercising judicial powers: [*see* paras. 520 *et seq* in Story's "Commentary on the Constitution of the United States"]. The reasons contained in the passages cited from the "Federalist" in paras. 1585, etc., of Story and the quotation from Mr. Tucker in the foot-note to para. 1637 will explain the development of the American rule. In one case, it was observed:

"It is a fundamental principle that every person restrained of his liberty is entitled to have the cause of such restraint enquired into by a judicial officer. The judicial department of the Government cannot by any legislation be deprived of this power or relieved

1. (1870) 6 Q.B. 1 at 17.
2. 19 Ill. 226.
3. 2 Allen, 361.
4. 19 Am. Rep. 656.
5. (1943) 2 M.L.J. 207: 6 F.L.J. 79 (F.C.) I.L.R. (1943) 2 Cal. 1 (F.C.).

of this duty." [*Boyett, In re*[1] quoted in the foot-note on page 185 in Cooley's "Constitutional Limitations"].

This view is partly based on considerations which will be discussed when dealing more specifically with the third objection. One result of the application of this rule in the United States has been to hold that

"legislative action cannot be made to retroact upon past controversies and to reverse decisions which the Courts in the exercise of their undoubted authority have made."

The reason given is that

"this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would in effect sit as a Court of review to which parties might appeal when dissatisfied with the rulings of the Courts". [*See* Cooley's "Constitutional Limitations," page 190].

In India, however, the Legislature has more than once enacted laws providing that suits which had been dismissed on a particular view of the law must be restored and retried. Two well-known instances are section 31 (2), Limitation Act, 1908, which provided for the restoration of suits dismissed on the ground that the 12 years' period of limitation under Article 132, Limitation Act, applied to suits for sale by holders of simple mortgages and the Public Suits Validation Act (XI of 1932) which provided for the restoration of suits dismissed on a particular interpretation of section 93, Civil Procedure Code. Again, debt relief legislation in the various provinces has provided even for the reopening of decrees passed *inter partes.* In view of the history of the rule in America, it is questionable whether it would be right to apply the same rule in this country. Further, the American authorities themselves show that, even in the United States, limitations had to be placed on the strict American rule and that it was not found possible to differentiate by a clear-cut definition the exercise of legislative power from the exercise of judicial power. [*See* Willi's "Constitutional Law of the United States," p. 142.]

An Australian case, *Federal Commissioner of Taxation* v. *Munro*[2], to which we were referred by the Advocate-General of India, bears some resemblance to the present case. An Act of 1922 had constituted a Board of Appeal to deal with appeals in income-tax matters and this Board had given certain decisions. But the law Courts declared that the Australian Parliament had no power to invest this Board of Appeal with judicial power. A later Act established what was described as a Board of Review and assigned to it functions which were held to be different in character from those assigned to the former Board of Appeal. It, however, went on to provide that decisions which had already been pronounced by the Board of Appeal "should be deemed to be and at all times to have been decisions of a Board of Review given in pursuance of the provisions of the later Act." The later Act was also challenged as vesting judicial power in the Board of Review, but this contention was overruled. The validating provision in the later Act was next challenged as constituting "an attempt by Parliament itself to exercise the judicial power of the Commonwealth." The answer to this argument is relevant here. One learned Judge (Isaacs, J.) interpreted this provision as implying a "retrospective creation" of the Board of Review and placing the decisions of the old Board of Appeal on the same footing as they would be on if the now existing Board of Review had then pronounced them (pp. 173, 174). Another learned Judge (Starke, J.) observed:

"Parliament simply takes up certain determinations which exist in fact, though made without authority, and prescribes not that they shall be acts done by a Board of Review, but that they shall be treated as they would be treated if they were such acts. The sections, no doubt, apply retrospectively, but they do not constitute an exercise of the judicial power on the part of the Parliament" (p. 212).

We think that this latter description is apposite to what happened in the present case and also answers the argument that it is an impossible feat to con-

1. 103 Am. St. Rep. 944. 2. (1931) 38 Com.L.R. 153.

vert what was not a trial under the Code of Criminal Procedure into a trial under the Code.

Judged by any reasonable test, it seems to us difficult to hold that what the Ordinance has attempted to do in this case amounts to an exercise of judicial power. A passing reference was made in this connexion to section 71 (3), Constitution Act, which precludes the legislative chambers from conferring on themselves "the status of a Court." This and the similar provision in section 28 (3) have no bearing upon the present question. They were intended to set at rest the question whether these legislative bodies had the power to punish for contempt. (Cf. *Doyle* v. *Falconer*[1], *Barton* v. *Taylor*[2] and *Fielding* v. *Thomas*[3]. Section 313 (1) which was also relied on in this connexion relates to the "executive" authority of the Governor-General in Council and not to the "law-making" capacity of the Governor-General. It was contended that once the decisions of the special Courts were held void for want of jurisdiction, the position in the present case would be nothing different from a sentence imposed by the Legislature directly on each of the accused in all the cases that had been before the special Courts. This does not seem to us to be a fair or correct view of the position. The Legislature has not attempted to decide the question of the guilt or innocence of any of the accused. That question had as a matter of fact been decided by tribunals which were directed to follow a certain judicial procedure. The effect of the absence of jurisdiction in these tribunals falls to be considered when dealing with the third objection. For the present purpose, however, we see no justification for importing a fiction that there had in fact been no judicial trial and that it is the legislation that declares the guilt of the accused in all the cases and imposes sentences upon them. It must be remembered that even under the Ordinance, the sentences are in due course subject to appeal to and revision by the regular Courts of the land.

In dealing with the third objection, it is again necessary to examine the basis of the American rule in order to determine whether it can be followed here. It is clear from the American authorities that this limitation has been derived from the interpretation placed by the American Courts on what are known as the Fifth and Fourteenth Amendments which provide against any person being "deprived of life, liberty or property without due process of law". The expression "due process of law" has been interpreted as referring only to "judicial process" and as not including legislation, and "judicial process" was held to imply competence or jurisdiction in the Court and an opportunity for a hearing. As this requirement had been made part of the written constitution, it followed that no enactment passed by a Legislature limited by that constitution could authorize anything in violation of it. [*See* Willoughby's "Constitution of the United States," paras. 1115 to 1117, 1122 and 1123.] Hence the rule (stated by Cooley) that

> "it would be incompetent for the Legislature, by retrospective legislation, to make valid any proceedings which had been had in the Courts but which were void for want of jurisdiction over the parties."

The constitutional position in India is different. Comparing the American Amendments with the provisions of the Constitution Act, 1935, it will be seen that the latter contains nothing corresponding to so much of the Amendments as related to deprivation of "life or liberty" and that even as to "property" it only requires that such deprivation should be "by authority of law:" *see* section 299. This does not of course mean that the well-established principle of British jurisprudence as to the sacredness of personal freedom is not part of the law of British India. But as pointed out by Dicey, the rule remains only as a principle of "private law" and is not a part of the Constitution: [*see*

1. (1866) L.R. 1 P.C. 328.
2. (1886) 11 A.C. 197.
3. (1896) A.C. 600.

Dicey's "Law of the Constitution," Edn. 9, p. 203 and Wade and Phillips, "Constitutional Law," Edn. 2, p. 354.] While its enactment as an article of the Constitution would have placed it beyond the power of the Indian Legislature to alter it, the position must be different so long as it remains a rule of private law, however cardinal and fundamental: [*See* Dicey, p. 200, foot-note]. The principle of the English law as to personal liberty was stated by Lord Atkin in *Eshugbayi Eleko* v. *Nigeria Administration*[1] in the following terms:

> "In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice."

Comparing the language of the American Amendments with this statement of the English rule, it will be noticed that what is required under the English rule is not "due process of law," but "legal justification" and such justification may be shown as much by legislation or statutory rules as by production of an order of Court: see *Rex* v. *Halliday*[2]. It does not however follow that Legislatures in India can arbitrarily interfere with the life or the liberty of the citizen, because they have only such powers as have been conferred on them by Schedule 7, Constitution Act.

The real question in the present case therefore is whether the Ordinance is covered by any of the entries in Schedule 7, Constitution Act. It was not contended that the mere absence of a specific provision about "validating laws" was by itself of much significance. As observed by this Court in *United Provinces* v. *Mt. Atiqa Begum*[3], the power of validation must be taken to be ancillary or subsidiary to the power to deal with the particular subjects specified in the Lists. No question arises in this case as to the distribution of the subjects between the Provincial Legislature and the Central Legislature, because a declaration of emergency under section 102, Constitution Act, has been proclaimed. It was contended that under the terms of section 102 (1) the Legislature could make laws only "for a Province," that is, separately for each Province and not for a number of Provinces together. There is no basis for this contention. Under the Interpretation Act, the use of the singular number will, in the absence of any indication to the contrary in the context or the nature of the subject, include the plural; the clause has apparently been worded in that particular form, because it has been enacted as an exception to section 100 (3) which excludes the power of the Federal Legislature "to make laws for a Province" in certain cases. If the Central authority can make laws for each of the Provinces, there is no principle in insisting that even when a uniform law has to be enacted for each of several Provinces, there can be no single enactment, but that there must be as many enactments as there are Provinces. It was further contended that where, as in this case, a proclamation of emergency under section 102 referred only to a threat "by war", the Central Legislature could encroach on provincial subjects only in respect of matters necessitated by the war and not in respect of subjects relating to "internal disturbance." The words of the section do not justify any such limitation. As regards authorization by the Lists in Schedule 7, it seems to us sufficient to say that the subject-matter of the present Ordinance is in our judgment covered by the expression "administration of justice" in entry No. 1 of List II and the expression "criminal procedure" in entry No. 2 of List III.

On behalf of the Crown, strong reliance was placed on the decision of the Judicial Committee in *Tilonko* v. *Attorney-General of Natal*[4] and of the High Courts in India in *Emperor* v. *Chanappa*[5] and *Jogendrachandra Ray* v. *Superintendent, Dum Dum Special Jail*[6] and as much controversy raged round

1. (1931) A.C. 662.
2. (1917) A.C. 260.
3. (1941) 1 M.L.J. (Supp.) 65: 3 F.L.J. 97 (F.C.) : (1940) F.C.R. 110 at 136 (F.C.).
4. (1907) A.C. 93.
5. (1931) I.L.R. 55 Bom. 263 (S.B.).
6. (1933) I.L.R. 60 Cal. 742.

them we feel we should refer to them shortly. The decision in *Tilonko* v. *Attorney-General of Natal*[1] is on the face of it, a strong authority in support of the contention advanced on behalf of the Crown. Their Lordships were dealing with an Act passed by the Natal Parliament which provided that

"all sentences passed by any person administering martial law.....are hereby confirmed and made and declared to be lawful and......shall be deemed to be final sentences passed by duly and legally constituted Courts of this Colony."

It is no doubt true that the matter was then before their Lordships on an application for special leave and it might have been sufficient answer to the application to say that the decision of a martial law authority was not that of a judicial tribunal at all and could not therefore be brought up before their Lordships. But their Lordships nevertheless proceeded to give other reasons in support of their dismissal of the application. The sentences in the judgment which have been particularly relied on by counsel for the Crown run as follows:

"An Act of Parliament has been passed in Natal which in terms enacts the legality of the sentences in question and provides that they shall be deemed to be sentences passed in the regular and ordinary course of criminal jurisdiction. This board has no power to review these sentences or to enquire into the propriety or impropriety of passing such an Act of Parliament......The Act has been assented to by the Governor and having the force of law, is binding on their Lordships."

We have been asked to treat this as a complete answer to two of the contentions advanced on behalf of the appellants, namely, that legislation conferring validity on sentences passed by an authority which had no jurisdiction in law is not permissible and that such legislation is in the nature of the exercise of judicial authority. On behalf of the appellants, two grounds of distinction (mentioned in the judgment of Bajpai, J.,) were relied on. It was said (on the strength of an observation of Mr. Brand in his book on the Union of South Africa referred to by Bajpai, J.) that under the South African Constitution, the Parliament was supreme and that even in Natal, as in Great Britain, the Courts had no authority to act as interpreters of the Constitution. This was answered by counsel for the Crown by pointing out that whatever might be the position in South Africa after the Statute of Westminster and after certain South African legislation of 1934, the position in 1906, when the Natal legislation considered by their Lordships was passed, was nothing different from that of any other Crown Colony, as the Natal Charter of 1856 only contained the usual clause authorizing legislation for the peace and good government of the Colony. That the same continued to be the legal position even after the Union of South Africa Act till the enactment of the Statute of Westminster was shown by comparing the decision in *Rex* v. *Ndobe*[2], with that in *Ndlwana* v. *Hofmeyr*[3]. It was next urged by counsel for the appellants that this decision had been treated by certain writers on Constitutional Law only as an authority for the proposition that an English Court could not enter into the propriety as opposed to the legal validity of a colonial statute (Chalmers and Asquith "Outlines of Constitutional Law," 3rd Edition, p. 203 and Ridges' "Constitution Law of England," 6th Edition, p. 491) and they asked us to infer therefrom that the question of the validity of the statute had apparently not been argued before their Lordships. On behalf of the Crown, attention was drawn to the report in Ex parte *Mqomini*[4], where the history of the proceedings of the martial law tribunal in Natal has been set out and the arguments at the Bar at that stage have also been more fully stated and we were asked to say that the same learned counsel who appeared for the petitioner in *Tilonko* v. *Attorney-General of Natal*[1], could not have omitted to raise the question of validity. Lastly, it was contended that a martial law tribunal was more analogous to an executive authority than to a judicial authority and that

1. (1907) A.C. 93.
2. (1930) South African L.R. App. Div. 484.
3. (1937) South African L.R. App. Div. 229.
4. (1906) 22 T.L.R. 413.

the decision was no authority for the contention that a void judgment of a judicial tribunal could be validated by subsequent legislation. Their Lordships' observation is very general and it seems rather difficult to restrict its effect in the way that counsel for the appellants asked us to do.

The decision in *Emperor* v. *Chanappa*[1], is no doubt an authority in favour of the Crown in so far as it held section 11 of the Ordinance then in question to be valid, but there is little discussion of the point there. In *Jogendrachandra Ray* v. *Superintendent, Dum Dum Special Jail*[2], the Court had not to consider the questions arising in the present case. *Trustees of the Ottawa Roman Catholic Schools* v. *The Quebec Bank*[3], which was also cited before us, throws little light on the questions arising here. Their Lordships had not to deal with a question of validation but only with a limited plea of *ultra vires* based on the exception to section 93 (1), British North America Act, to the effect that the law should not

"prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union."

Two other grounds of invalidation were suggested, though but faintly. It was said that the provisions of the Ordinance were hardly likely to conduce to peace and good government, and were not therefore authorized by section 72 of Schedule 9. It is sufficient answer to this to say that the Judicial Committee have laid down that this is not a matter for the Courts to investigate. It was next said that section 3 (1) of the Ordinance was retrospective in its operation and that the Governor-General had no power to pass Ordinance with retrospective effect. This question has been discussed at some length in Federal Court Cases Nos. 13 to 21 of 1943 (*Emperor* v. *Sibnath Banerjee, etc.*[4]) and section 3 (1) of Ordinance XIX is no more retrospective in its operation than section 3 of Ordinance XIV of 1943 which was then held to be valid. We accordingly hold that section 3 (1) of Ordinance XIX of 1943 confers validity and full effectiveness on sentences passed by special Courts functioning under the Special Criminal Courts Ordinance (Ordinance II of 1942) and that this provision is not *ultra vires* the Governor-General.

Two questions have arisen in the course of the hearing on the construction of section 4 of the Ordinance. It has been brought to our notice that in some instances (Cases Nos. 39 and 54 before us) references which had to be made or have been made under section 8 of Ordinance II of 1942 had either not been made or had not been disposed of by the Review Judge, when the new Ordinance (XIX of 1943) came into operation. A question arises whether such cases fall under section 3 (1) or section 4 of the Ordinance. Section 4 purports to deal with cases of which the "trials" before the Special Courts had not "concluded." The Advocate-General of the United Provinces admitted that the trial could be said to be concluded only when the Judge had pronounced his judgment (*vide* the way that the sections are grouped in subdivisions F. & H. of chap. 23, Criminal Procedure Code), but he maintained that the "review" proceedings under section 8 of the Ordinance were no part of the trial. The Advocate-General of Bihar maintained that the trial must be held to have concluded as soon as the case became ripe for judgment (*vide* chap. 26 of the Code which treats the judgment as coming after the close of the trial). Our attention was drawn in this connexion to *Jiban Molla* v. *Emperor*[5] and *Bakshi Ram* v. *Emperor*[6]. The discussion in these cases only confirms what one would have thought even independently of them, *viz.*, that the meaning of the word "trial" must largely depend on the context and the scheme of the enactment in which it occurs. Though the word may sometimes denote only the recording of evidence, it is obvious that in the context in which it occurs in Ordinance XIX of 1943 it must comprise all stages of the proceed-

1. (1931) I.L.R. 55 Bom. 263 (S.B.).
2. (1933) I.L.R. 60 Cal. 742.
3. (1920) A.C. 230.
4. (1943) 2 M.L.J. 468: 6 F.L.J. 151 (F.C.).
5. (1933) 37 C.W.N. 906.
6. I.L.R. (1938) All. 157.

ing, including the imposition of the sentence. The contradistinction made by the Ordinance is between cases in which a sentence had been passed by the special Courts and cases in which no such sentence had been passed, the former falling under section 3 (1) and the latter under section 4. If it should be assumed that the two categories might not be exhaustive and cases might be conceived which even while not falling under section 4 might not fall under section 3 (1), the result would only be that the proceedings in such cases would be void under the former decision of this Court and the accused would have to be retried before the regular Courts. The cases which are dealt with by cls. (*a*) and (*b*) of section 8 of Ordinance II of 1942 stand on a special footing. The two clauses provide for review of the Special Judge's judgment by one of the Judges of the High Court nominated by the Provincial Government. The word "review" does not appear to have been used in any technical sense there, but it obviously differs both from a review as understood in the Civil Procedure Code as well as an appeal, because these proceedings are ordinarily initiated by the party concerned. The scheme of section 8 of Ordinance II of 1942 is that in the more serious classes of crimes therein referred to, the sentence of the Special Judge should, apart from any initiative of the accused, be considered by the reviewing Judge. There is of course a difference between cls. (*a*) and (*b*) to this extent that in cases falling under cl. (*a*) the review follows compulsorily and automatically, whereas in cases falling under cl. (*b*) the review procedure becomes available only if the Special Judge thinks it necessary to submit the case to the reviewing Judge. But once the case has been so submitted, there is no difference in the legal position between cases falling under cl. (*a*) and cases falling under cl. (*b*) of section 8. It may perhaps be putting the position too high to describe the sentence of the Special Judge in these cases as only provisional or tentative; but the scheme of the section undoubtedly is that the proceeding against the accused in such cases is not to be regarded as complete till after the review is over. In this view, we are of the opinion that in all cases falling under section 8 (*a*) and in all cases where references had been made by the Special Judge under section 8 (*b*) the accused will have to be tried under section 4 of Ordinance XIX of 1943, unless the reviewing Judge, acting under the Special Criminal Courts Ordinance, had given his decision before the new Ordinance XIX of 1943 came into operation. The words "whether or not the proceedings in which the sentence was passed were submitted for review under section 8" in cl. (2) of section 3 must be taken to have been used only to indicate that even the adverse termination of the review proceedings would not exclude the right of appeal and revision given by the clause. The possibility that the High Court as a Court of appeal or acting as a confirming Court under Chap. 27, Criminal Procedure Code, may consider or confirm the sentence will not in our opinion suffice to bring this special class of cases under section 3 (1) of the new Ordinance, or take them out of the operation of section 4.

A further contention was advanced with reference to cases in which the accused had been sentenced to death by the special Courts. It was argued that as under sections 31 and 374, Criminal Procedure Code, a sentence of death passed by a Sessions Judge was subject to confirmation by the High Court and as no such confirmation by the High Court as such had been provided for in the Ordinance, one of two consequences must follow: either the unconfirmed sentences must be treated as incapable of execution on the ground that there was no one who could properly refer them for confirmation, or the cases should be treated as pending cases within the meaning of section 4 of the Ordinance. Whilst we agree that such sentences cannot be executed until confirmed by the High Court, we can see nothing to prevent the judicial officer who passed the sentences or the Sessions Judge for the time being referring

them for confirmation to the High Court. We are also unable to accede to the contention that such cases can be treated as falling under section 4 even after they had been dealt with by a Review Judge under section 8 of Ordinance II of 1942. Section 4 of Ordinance XIX can be invoked only in cases where the trial before the special Courts had not concluded. The High Court acting as such under the Criminal Procedure Code cannot be spoken of as a "special Court" within the meaning of the above provision. We now turn to the individual cases before us.

*Cases Nos.* 39 *and* 54.—In these two cases the convicted persons have come up in appeal against judgments of the Patna and Allahabad High Courts respectively dismissing their appeals from sentences passed by Special Judges. In both cases the sentences were subject to review under section 8 (*a*) of Ordinance II of 1942. On the date of the commencement of Ordinance XIX of 1943 the review had not been completed. These cases therefore fall within the purview of section 4 of that Ordinance, with the result that the proceedings had in respect of them before the Special Judges must be held to be void and the cases must be deemed to have been transferred to the appropriate Court under that section for inquiry and trial in accordance with the provisions of the Criminal Procedure Code. The appeals in these two cases are allowed and further proceedings will be taken in accordance with the provisions of section 4 of Ordinance XIX.

*Cases Nos.* 35, 36, 43, 44, 45, 46 *and* 49.—Cases Nos. 35 and 36 are appeals from orders of the Patna High Court refusing writs of *habeas corpus*, while case No. 49 is an appeal from an order of the Madras High Court refusing writ of *certiorari*. Cases Nos. 43, 44, 45 and 46 are appeals from a preliminary judgment of the High Court at Nagpur upholding the validity of section 3 (1) of Ordinance XIX of 1943. The conclusions at which we have arrived concerning the validity and effect of section 3 of the Ordinance must result in the dismissal of all these appeals and we order accordingly.

*Cases Nos.* 40, 41 *and* 42.—These are appeals from judgments of the Patna High Court dismissing in each case the appeal of the convict from a sentence of death and confirming the sentence passed by a Special Judge for the offence of murder in the first two cases and for the offence of waging war against His Majesty the King in the third case. In these and in other cases where the High Courts had dismissed the appeals of the convicts on the merits, we granted leave on applications made to us for grounds on the merits of the cases to be raised before us. In some of these cases counsel made attempts to persuade us to assess the weight of evidence for ourselves in order to determine whether the conviction was or was not justified in each case on the evidence. This we declined to do as we hold the view that in cases of this description we should ordinarily accept as final the conclusions of fact at which the High Court has arrived unless it can be shown that the High Court has either misread any part of the evidence or has overlooked any material portion of it. In these three cases we have not been shown sufficient grounds for disturbing the conclusions at which the High Court has arrived concerning the guilt of the appellants.

As regards the sentence it was urged that the death sentence imposed in these cases should be reduced to transportation for life on account of the time that has elapsed since the sentences were first pronounced: see *Autar Singh* v. *Emperor*.[1] It is true that death sentences were imposed in these cases several months ago, that the appellants have been lying ever since under threat of execution, and that the long delay has been caused very largely by the time taken in proceedings over legal points in respect of the constitution of the Courts before which they were tried and of the validity of the sentences them-

1. (1913) 17 C.W.N. 1213.

selves. We do not doubt that this Court has power, where there has been inordinate delay in executing death sentences in cases which come before it to allow the appeal in so far as the death sentence is concerned and substitute a sentence of transportation for life on account of the time factor alone, however right the death sentence was at the time when it was originally imposed. But this is a jurisdiction which very closely entrenches on the powers and duties of the executive in regard to sentences imposed by Courts. It is a jurisdiction which any Court should be slow to exercise. We do not propose ourselves to exercise it in these cases. Except in case No. 47 (in which we are commuting the sentence largely for other reasons as hereafter appears), the circumstances of the crimes were such that if the death sentence which was the only sentence that could have been properly imposed originally, is to be commuted, we feel that it is for the executive to do so. We do not doubt that in each case the executive will give the fullest consideration to the period that has elapsed since the original imposition of the sentence and to the consequent mental suffering undergone by the convict. It has been further suggested that in England when cases in which a death sentence has been imposed are allowed to be taken to the House of Lords on account of some important legal point, the consequential delay in finally disposing of the case is treated as a ground for the commutation of the death sentence, and that if such a practice is recognized in cases which go with the Attorney-General's authority to the House of Lords because they "involve some point of law of exceptional public importance" [Criminal Appeal Act, 1907, section 1 (6)] a similar course might well be taken in this country in these cases in connexion with which "substantial questions of law as to the interpretation of the Constitution Act" have twice had to be considered by this Court in view of the granting by High Courts of certificates under section 205, Constitution Act. We consider however that these matters are primarily for the consideration of the Executive and do not in the circumstances of these cases justify us in commuting the death sentences by orders of this Court. With these observations we dismiss these appeals.

*Case No.* 47.—The appellant in this case was convicted by a Special Judge of the offence of murder and was sentenced to death on 30th September, 1942. His appeal to the Allahabad High Court was dismissed and the sentence of death was confirmed. The appellant is a young man of 25 who has been twice widowed. His victim was his aunt, 30 years of age, whose husband (Kanchan) had about six years previously murdered his own brother, appellant's father. Kanchan was sentenced to death for the murder, but lost his reason while awaiting the execution of the death sentence, and is now detained as a lunatic. The evidence in this case leaves no room for doubt that the appellant was rightly convicted of murder. There is some confusion as to the exact motive for the undoubtedly brutal assault of which the appellant made his aunt the victim. The prosecution alleged that the appellant being a widower was chagrined by the refusal of his aunt to become his mistress. In his statement before the Special Judge he said that another uncle (P.W. 7) who according to the appellant was behind the prosecution was on terms of improper intimacy with the deceased and resented even small acts of kindness on the part of the deceased towards the appellant. In the appeal preferred by him through the jail authorities to the High Court, the appellant stated that his aunt was a woman of loose character and was pursuing him with unwelcome attention. The previous history of this family indicates that the appellant probably suffers from an unbalanced mind. The nature and ferocity of the assault upon his aunt appear to confirm this. In committing the offence the appellant must have been actuated by jealousy or by indignation either of which would tend further to disturb the balance of his mind. He has besides been awaiting the execution of his death sentence for over a year. We think that in this case a sentence of transportation for life would be more appropriate than the sen-

tence of death. We accordingly reduce the sentence of death to one of transportation for life and subject to this modification dismiss the appeal.

*Case No.* 38.—The appellants in this case, Jagan Nath Sahu and Ramanand Sahu were convicted by a Special Judge of the offence of rioting and mischief by fire and were sentenced to three years' rigorous imprisonment and a fine of Rs. 300, in the case of Jagan Nath, and four years' rigorous imprisonment and a fine of Rs. 300, in the case of Ramanand. Their appeal was dismissed by the Patna High Court. The appellants are alleged to have been members of an unlawful assembly consisting of about two thousand people who raided a police beat house on 21st August, 1942, and destroyed various items of Government property, and also looted a post office and a liquor shop close by. The question on which we feel considerable doubt is whether the complicity of the two appellants before us in these events has been satisfactorily established. On the evening of 21st August an entry (Ex. 1) was made in the station diary kept at the beat house, by the Assistant Sub-Inspector in charge of the beat house, recording a brief summary of the incidents that took place in the course of the riot but omitting all mention of the names of any accused persons in connexion therewith. On 26th August, Bansi Lall Chaudhury (P.W. 4), the liquor vendor, and Umapat Labh (P.W. 6), the branch postmaster, handed to the police reports in respect of the incidents relating to the liquor shop and the post office respectively. These reports are Ex. 3 and Ex. 5. Ex. 3 contains the names of eleven persons including those of the appellants, while Ex. 5 refers to a mob consisting of Ramanand Sahu and others. The formal first information report was not drawn up till 3rd September, 1942. It contains the names of the appellants and several others. The evidence in the case consists of the testimony of Siva Chandar Tewari (P.W.1), Assistant Sub-Inspector in charge of the beat house; Ramanand Singh (P.W. 2), constable, and Abbas Mian (P.W. 3), dafadar, both attached to the beat house; Bansi Lall Chaudhury (P.W. 4); Nagina Prasad (P.W. 5), Sub-Inspector of Police, who carried out the investigation; and Umapat Labh (P.W. 6). These witnesses were examined in Court on 21st and 22nd December.

The investigation had been supervised by Babu Rameshwar Prasad Singh, Divisional Inspector. On the morning of 23rd December a petition was put in on behalf of Ramanand Sahu asking that Babu Rameshwar Prasad Singh should be summoned as a witness, as it was the case of Ramanand Sahu that none of the prosecution witnesses had during the investigation mentioned his name to this officer as an accused person. This application was rejected by the Special Judge on the grounds, first, that the witness had been transferred to a neighbouring district and that undue delay would be occasioned to the trial if he were to be summoned to give evidence, secondly, that the application ought to have been made earlier and that there was no explanation for the delay in making it, and thirdly, that the evidence of the witness was not material. We are unable to appreciate the reasons given by the Special Judge for declining to summon this witness. In our opinion, he was a material witness and should have been examined as a prosecution witness or at least offered for cross-examination. His transfer to a neighbouring district should have made no difference as it should have been possible for the Crown to procure his attendance with the minimum of delay. The necessity for procuring the attendance of this witness for examination became apparent to the particular accused and his advisers only on 22nd December during the examination of Nagina Prasad (P. W. 5). We fail to see how the accused could be charged with undue delay in making the application. On this ground alone we would have been disposed to hold that serious prejudice had been occasioned to Ramanand Sahu, appellant, by the failure of the Judge to direct the attendance of this witness.

There are other unsatisfactory features in the case and, on the evidence, we do not think the conviction in this case can be sustained. To continue with

the case of Ramanand Sahu, his name is found in the first information report both in the list of accused persons as well as among the witnesses. He was examined by the police during the course of the investigation as a witness, though the investigating officer made an attempt to explain this away by saying that he was examined as an accused person. As no other accused person was examined during the course of the investigation it is difficult to accept this explanation as correct. Further in the first information report of 3rd September, 1942, the Assistant Sub-Inspector states, after describing the incidents, that he asked the accused "who was present in the mob to see to this occurrence but he replied that he was unable to do anything as the mob was out of control." This is not easily reconcilable with the view that the accused was himself one of the rioters. The Special Judge found that the investigating police were not able to make up their minds for some time whether Ramanand Sahu was present with the mob as a member of the unlawful assembly or as an innocent spectator. If that was so, it is not possible to maintain his conviction for the reason that the only evidence that can be taken into account against him on behalf of the prosecution is the testimony of P.W. 1 (Assistant Sub-Inspector) and P.W. 3 (Police dafadar). This testimony was available to the police at the earliest possible moment and if true should have put the matter of the complicity of Ramanand Sahu in the riot beyond doubt. If nevertheless the investigating police could not make up their minds with regard to the complicity of Ramanand Sahu, the only inference to be drawn therefrom is that they were not satisfied with the statements of these two witnesses made in the course of the investigation.

It is true that P.W. 2 (Ramanand Singh, constable) also mentioned Ramanand Sahu's name at the trial as one of the rioters, but it has been established that this witness had stated during the investigation that he was being so much mobbed during the riot that he was unable to identify anyone. His subsequent statement in Court against Ramanand Sahu was therefore worthless. Both Ramanand Sahu and Jagan Nath Sahu were stated by P.W. 4 and P.W. 6 to have taken part in the riot, but the testimony of these two witnesses was rightly rejected by the High Court on the ground that they did not mention the names of these two accused persons before the Deputy Superintendent of Police during the investigation. The prosecution case is, however, open to challenge on a more serious ground. According to the investigating Sub-Inspector the names of certain rioters, including those of the two appellants, were definitely ascertained immediately after the riot; yet he gave instructions to the Assistant Sub-Inspector not to enter the names of the accused persons in the entry made in the station diary (Ex. 1) the same evening "as a matter of precaution." The explanation given was that as copies of the entries in the station diary had to be sent to head-quarters and the country-side round about was in a very disturbed state it was feared that a copy of the entry might fall into the hands of the rioters or their sympathizers and that this might attract reprisals against the police. We do not consider this explanation satisfactory. The apprehension of reprisals, if it was at all justified, would result just as much from the fact of the incident of the riot being entered in the diary as from the mention of the names of accused persons in it. As a matter of fact the diary does mention the name of Ramanand Sahu as a person near whose house the mob was when it was first observed by one of the police witnesses. The direction by the Sub-Inspector deliberately to keep the names of the accused persons out of the diary raises so strong a doubt with regard to the whole of the prosecution case that, taking it with the other features of the case that we have mentioned above, we are forced to the conclusion that it would not be safe to maintain the conviction of either of the appellants. We, therefore, accept their appeal and acquit them. They must be released forthwith and the fines, if recovered, should be refunded.

*Case No.* 53.—In this case the five appellants were sentenced to rigorous imprisonment for a period of seven years, a fine of Rs. 200, and a whipping of ten stripes each for attacking a railway station and damaging the telephone and telegraph apparatus, machinery in a signal box and other Government property, about 1-30 P. M. on 15th August, 1942. Their appeal to the Allahabad High Court was dismissed and the sentences were upheld. The Special Judge who tried the case found that the whole of the prosecution evidence was unsatisfactory but nevertheless convicted the appellants and some others who were acquitted by the reviewing Judge. The learned Judge of the High Court who dealt with the case on appeal took on some points a view of the evidence different from that taken by the Special Judge and upheld the conviction and sentences as he found that some of the prosecution evidence was less open to objection than the trial Judge thought was the case. We are unable to agree with this view. The first information report was alleged to have been drawn up at 3 P.M. on 15th August, almost immediately after the occurrence. The Special Judge found that the report was not made at 3 P.M. but after 7 P. M. and that it was deliberately "ante-timed." The learned Judge of the High Court did not reject this finding. This finding alone would be sufficient to cast serious doubt on the prosecution case with regard to the participation of particular individuals in the incidents that occurred at or near the railway station. Again, the prosecution case was that as the mob was damaging the telephone and telegraph apparatus the appellants along with others were arrested at or near the railway premises after a chase and were brought to the railway station where they were identified by the railway staff. This version was flatly contradicted by the railway staff, and the trial Judge found that the prosecution case on this point could not be accepted. With regard to the evidence of the station staff, the only observation made by the learned Judge of the High Court was that the matter was not of any very great importance and that the failure of the station staff to support the prosecution case on this point was immaterial. The learned Judge went on to find that the appellants were arrested in the manner alleged by the prosecution, but this was based more upon the improbability of the defence version on the point rather than upon the reliability of the prosecution evidence. This is unsatisfactory. We think that the finding of the trial Judge that the arrests were not made at or near the railway station was fully justified. We must point out that at the very least these two findings, namely, with regard to the time of the recording of the first information report and the time and place of the arrest, establish the complete unreliability of the police witnesses who were examined in the case.

The rest of the evidence consisted of the testimony of three headmen, three boys of the local vernacular school aged 11, 12 and 13, and two witnesses named Dip Singh and Kanhai. As regards the last named two witnesses, the trial Judge held that it was impossible to place any reliance upon their statements. The learned Judge of the High Court also ignored their evidence as he found that they had clearly been unwilling to give evidence against any of the accused. With regard to the headmen, the finding of the trial Judge was that the witnesses were not present during the occurrence at all, nor did they take part in the arrests, and he consequently altogether ignored their testimony. The learned Judge of the High Court, on the other hand, held these witnesses to be witnesses of truth. We have gone carefully through the detailed reasons given by the trial Judge for rejecting the testimony of these witnesses and we agree with him that their evidence cannot be accepted as true. The learned Judge of the High Court did not consider all the reasons given by the trial Judge for disbelieving these witnesses. He dealt with only one point in this connexion, namely, whether the witnesses had given good reasons for being present in the town where the riot took place on the day and at the time of

the riot. He appeared to think that apart from any reasons given by these witnesses for being present in the town, it was quite natural that they should be in the town especially when there was some excitement going on about that period. He found the stories related by them quite natural and convincing. We regret we are unable to agree. In our opinion, it was the reverse of natural for these headmen who belong to neighbouring villages, to leave their villages where their duties lay, at a time of excitement. The trial Judge having given convincing reasons for rejecting the testimony of these three witnesses, the learned Judge of the High Court was not, in our opinion, justified in overriding the finding of the trial Judge merely because he had himself a feeling that this testimony should have been accepted. He should have tried to meet the detailed reasons given by the trial Judge in support of his finding before overriding it. We are ourselves unable to accept the evidence of these witnesses as true.

This leaves us with the evidence given by the three school boys. The position with regard to this is little better. It appears that these boys were taken into custody on the day of the riot and were only released on certain persons standing surety for them. At the time of giving evidence at the trial, they were living with the sureties and not with their parents. One of them stated that he had been told that he could go home only after giving evidence. They made completely contradictory statements in their examination-in-chief and cross-examination. The trial Judge observed with regard to two of them that they had probably been won over by the defence and with regard to the third that he was making a tutored statement. The learned Judge of the High Court was of the opinion that these boys had been influenced against the prosecution and that they were not willing witnesses. He concluded from this, however, that anything that they had stated against the appellants was worth a good deal more than it would have been if they had been friendly to the prosecution. We do not consider this a correct or fair approach. Once a witness has been found to be wholly unreliable it is unsafe to place any reliance upon any part of his testimony. It should not be open to the prosecution to pick out a bit here and a bit there from the evidence of a witness whom they themselves are not willing to accept as a witness of truth, and to use these salvaged bits, from testimony which is otherwise contaminated, to bolster up their case against particular accused persons.

The gist of the learned High Court Judge's finding on the whole case is contained in the observation that there was really no explanation why anybody should have invented a false case against the appellants. This is not in our opinion a justifiable point of view to adopt in a case like the present where the prosecution evidence was found to be largely false and riddled with defects and contradictions. The prosecution having failed completely to establish the guilt of the appellants by good and reliable evidence, it was not for the appellants to explain why their names had been mentioned by the prosecution witnesses as persons who had participated in the riot. We have already stated why it is in our opinion unsafe to rely upon the testimony of the police witnesses in this case. As the trial Judge did, however, rely upon the testimony of Chhabnath Singh, constable, and based his finding with regard to the guilt of at least two of the appellants solely upon that evidence, we consider that an observation or two are called for in that connexion. The trial Judge stated that there was no reason to disbelieve this witness though he had undoubtedly made untrue statements on certain points. He then went on to observe that this witness had certainly falsely accused one of the persons whom the trial Judge acquitted on a positive finding that he was not present among the crowd that committed the riot. The trial Judge having found that this witness had told lies with regard to the time at which the first information report was recorded, with regard to the time and place of the arrests and with regard to

the participation of Soney Lal accused in the riot, we fail to see how any reliance could be placed upon his testimony with regard to the alleged participation of other accused persons in the riot.

The view that we take of the case is that the trial Judge gave good and convincing reasons for rejecting the testimony of the prosecution witnesses and wrote what in effect amounted to a judgment of acquittal. For some reason, however, he thought it the better part of wisdom to convict some at least of the accused persons who had been put on their trial before him. The learned Judge of the High Court should have treated the judgment as one of acquittal and should have addressed himself to the question whether in case of an appeal by Government he would have been justified in upsetting the judgment if it had been given the form, as it already possessed the substance of a judgment of acquittal. If the learned Judge of the High Court had approached the question from that point of view, we feel sure, he would have declined to reverse the trial Court's findings with regard to the value to be attached to the prosecution evidence and would have given effect to them by himself passing an order of acquittal. We are clearly of the opinion that on the record as it stands there is nothing to support the appellants' conviction, which must be set aside. We therefore accept the appeal, acquit the appellants and direct that they should be released forthwith, and that the fines, if recovered, should be refunded.

*Cases Nos.* 37, 50, 51 *and* 52.—In these cases the appellants were convicted by Special Judges of serious offences committed during the disturbances of last year and were sentenced to various terms of imprisonment. Their appeals to the Patna High Court were dismissed. Nothing was urged before us which served to raise any doubt in our minds with regard to the propriety of the convictions and sentences. Our attention was however drawn to what we cannot but regard as a very serious irregularity committed by the Special Judge in Case No. 37 in recording the evidence of some of the prosecution witnesses, *e.g.*, P.Ws. 3, 4, 5 and 7. The memorandum of the substance of the evidence of P. Ws. 1 and 2 having been recorded, the Judge contended himself in the case of several other witnesses with summarizing their examination-in-chief relating to the main incidents to which they were deposing by recording merely that they corroborated or supported the statement of P. W. 2, or gave the same story as P.W. 2. Under the provisions of section 6 of Ordinance II of 1942, the Special Judge was not bound to record the evidence of any witness *verbatim*, but he was bound to record a memorandum of the substance of the evidence of each witness examined. The record of the evidence of P.W. 2 no doubt represents the substance of the evidence given by that witness. The statement that other witnesses corroborated or supported the statement of P. W. 2 or gave the same story as P.W. 2 with respect to certain incidents surely does not constitute a memorandum of the substance of the evidence given by those witnesses. We have no doubt that the failure on the part of the Judge to comply with the provisions of section 6 of Ordinance II of 1942 put the accused at a certain disadvantage and occasioned a certain amount of prejudice to them in the conduct of their defence. We are however satisfied on an examination of the whole record that the irregularity did not in fact occasion a failure of justice. We dismiss these appeals.

V.S. ——— *Appeals,* 38, 39, 53 *and* 54 *allowed.*

*Appeals* 35 *to* 37, 40 *to* 46 *and* 49 *to* 52 *dismissed.*

*Appeal* 47—*Sentence modified.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Kuppammal .. *Appellant**

*v.*

Thangamuthu Pandaram and others .. *Respondents.*

*Hindu Law—Maintenance claim by wife—Burden of proof that the wife led an unchaste life on the husband—No further proof required of the husband to show that at the time of the suit the wife led an immoral life.*

A wife who has sued for maintenance on the ground that she was a chaste woman and that she has left her husband owing to his misconduct, is not entitled, when the husband proves that she has lived an immoral life and that it is not his fault that she has left him, to claim maintenance on the ground that the husband should also prove that she was living an immoral life when she filed the suit.

*Jeeva Ammal* v. *Ranganatha Mudaliar,* (1939) 2 M.L.J. 294, followed ; *Subbayya* v. *Bhavani,* (1914) 24 I.C. 390, distinguished ; *Nagalakshmamma* v. *Viswanatha Sastri,* (1912) 23 M.L.J. 289 and *Satyabhama* v. *Kesavacharya,* (1915) 29 M.L.J. 87 : I.L.R. 39 Mad. 658, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in A. S. No. 77 of 1941, preferred against the decree of the Court of the District Munsiff of Palni in O. S. No. 124 of 1940.

*K. S. Ramamurthi* for Appellant.

*Ch. Raghava Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant brought a suit for maintenance against her husband in the Court of the District Munsiff of Palni. The District Munsiff gave her a decree for Rs. 60 per annum for maintenance and Rs. 7 per annum for clothing from the date of the plaint. The husband appealed and the Subordinate Judge of Dindigul reversed the decree of the trial Court and dismissed the suit. Admittedly the plaintiff has been living apart from her husband since about 1928, and the learned Subordinate Judge found that she had led an immoral life with the witness D. W. 2 between the years 1929 and 1931. The finding of the Subordinate Judge on this point cannot be challenged in second appeal and, if proof that the plaintiff was leading an immoral life between the years 1929 and 1931, was a good defence to the suit, this second appeal must fail.

It is argued, however, for the plaintiff that she was in any event entitled to what is called in the text books " starving maintenance." It has been held, no doubt, that a wife who has once led an immoral life may still be entitled to " starving maintenance " if she has repented and at the date when she claims maintenance is leading a moral life. In fact, in the present suit, there was no evidence as to whether the plaintiff was or was not leading a chaste life when the suit was filed. The contention for the plaintiff, however, is that it was not sufficient for the defendant to prove that she had led an immoral life, but the burden was on him also to prove, if he was to escape the payment of any maintenance, that she was leading an immoral life at the date of the suit. This question has been dealt with by Wadsworth, J., in *Jeeva Ammal* v. *Ranganatha Mudaliar*[1]. The facts in that case are not distinguishable, from the point of view of the principle involved, from the facts in the present case. In that case a wife had left her husband's house as a result of her own adultery and then, after remaining apart from him for many years, had filed a suit for maintenance. She asked for maintenance on the ground that she throughout had remained chaste and that she had left her husband's house owing to his misconduct. The plaintiff, therefore, in the present case as in *Jeeva Ammal* v. *Ranganatha Mudaliar*[1] once it was found that she had been guilty of adultery, has fallen back on the plea that she at any rate is entitled to starving maintenance for the reason that her husband has not proved that she was leading an immoral life at the date of suit. Wadsworth, J., rejected this contention and observed that it seemed to him quite clear :

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* S. A. No. 148 of 1943. 3rd February, 1944.

1. (1939) 2 M.L.J. 294.

"that a woman cannot file a suit on the basis of her own chastity and her husband's misconduct and, when she is proved to be unchaste and her husband's conduct is found to be irreproachable, fall back upon a plea of infidelity and subsequent reformation which has never been advanced and is not supported by the necessary evidence."

Learned counsel for the plaintiff contends that Wadsworth J.'s decision is opposed to the decision of a Bench of this Court in *Subbayya* v. *Bhavani*[1]. In that case a husband had brought a suit for a declaration that his wife was not entitled to maintenance from him, and he proved that some 18 months before the date of suit she had given birth to a child that was not his. It was held that this was not sufficient to entitle the husband to a decree as he had not proved that his wife was living unchastely at the date of suit. The case is not referred to by Wadsworth, J.; but it seems to me that it is distinguishable. In *Jeeva Ammal* v. *Ranganatha Mudaliar*[2] the decision is founded not merely on a rule as to the burden of proof, but on the question of the burden of proof taken with the case pleaded. Wadsworth, J., refers to *Nagalakshmamma* v. *Viswanatha Sastri*[3] in support of the view taken by him. That case was decided by a Bench of this Court and it was held that where a wife has committed adultery she is not entitled to maintenance unless either the adultery has been condoned or the wife has shown that she has reformed her character. In *Satyabhama* v. *Kesavacharya*[4], it was held that a woman who lived an immoral life but reformed her ways at the time of suit is entitled to starving maintenance. In that case, however, the question of the burden of proof did not arise. With respect, therefore, I agree with the decision of Wadsworth, J., in *Jeeva Ammal* v. *Ranganatha Mudaliar*[2]. The plaintiff in the present suit, after suing for maintenance on the ground that she was a chaste woman and that she had left her husband owing to his misconduct, was not entitled, when the husband proved that she had lived an immoral life and that it was not his fault that she had left him, to claim maintenance on the ground that the husband must also prove that she was living an immoral life when she filed the suit.

The appeal is therefore dismissed with costs.

Leave to appeal is refused.

K.C. —— *Appeal dismissed.*

## [FULL BENCH.]

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE LAKSHMANA RAO.

Chintalapati Murthiraju .. *Petitioner**

*v.*

Chintalapati Subbaraju and others .. *Respondents.*

*Civil Procedure Code (V of 1908), section 115—Scope—Decision by subordinate Court on question of inadequacy of court-fee—When open to revision by the High Court.*

A revision petition lies when a Court subordinate to the High Court has held that the plaintiff has inadequately stamped his plaint but a revision does not lie when a defendant has unsuccessfully challenged the adequacy of the stamp affixed by the plaintiff, unless a further question of jurisdiction is involved.

*Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*, (1927) 55 M.L.J. 345 : I.L.R. 51 Mad. 664 and *Kattiya Pillai* v. *Ramaswamia Pillai*, (1929) 56 M.L.J. 394, affirmed.

*Gupta and Co.* v. *Kirparam Brothers*, (1934) I.L.R. 57 All. 17 and *Manaithunainatha Desikar* v. *Gopala Chettiar*, (1938) 1 M.L.J. 317, disapproved.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Ellore dated 2nd July, 1943 and made in Check Slip in O. S. No. 4 of 1942.

*P. Suryanarayana* for *P. Somasundaram* for Petitioner.

*P. Satyanarayana Raju* for Respondents.

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1. (1914) 24 I.C. 390.
2. (1939) 2 M.L.J. 294.
3. (1912) 23 M.L.J. 289.
4. (1915) 29 M.L.J. 87 : I.L.R. 39 Mad. 658.

* C. R. P. No. 719 of 1943. 21st February, 1944.

This petition coming on for hearing, the Court, *Byers, J.*, made the following

ORDER OF REFERENCE TO A FULL BENCH.*—In this petition under section 115, Civil Procedure Code, the correctness of the court-fee ordered to be paid by the plaintiff has been challenged as an error of jurisdiction and an objection has been taken that the matter does not fall within the scope of this section. In *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1], it was held by a Bench that where the lower Court has passed an order directing the plaintiff to pay additional court-fees on an erroneous view of the court-fee payable and refused to proceed with the suit unless such sum was paid, the High Court will entertain a revision petition to set aside the order, although an appeal would lie later on the consequential order that might be passed by the lower Court if the additional stamp duty was not paid. Kumaraswami Sastri, J., took the view that because the Court declined to proceed further with the suit unless the court-fee was first paid, it amounted to a refusal to exercise jurisdiction and that the Court should interfere in revision. In that case several earlier decisions on the question were reviewed and the preliminary objection that revision did not lie was overruled. The case of *Kattia Pillai* v. *Ramaswamia Pillai*[2] related to the question of jurisdiction also but Venkatasubba Rao, J., accepted the argument that the High Court can interfere in revision if the lower Court's order on the question of court-fee is unfavourable to the plaintiff, although he said he would not interfere at the instance of a defendant. In *Secretary of State for India* v. *Raghunathan*[3], Sir Owen Beasley, C.J. and Bardswell, J., took the view that neither under section 115, Civil Procedure Code, nor under section 107 of the Government of India Act has the High Court power to interfere in revision with an order in regard to court-fee which is in favour of the plaintiff, but in that case the petitioner was the Secretary of State represented by the Collector of Tanjore, who was not a party to the proceedings in the lower Court but had attempted to intervene apparently in the interests of the revenue. The learned Chief Justice referred to the decision in the earlier cases and accepted the view that the Court can interfere with an order directing the plaintiff to pay additional court-fee.

The learned Chief Justice also referred to the view taken by Venkatasubba Rao, J., in *Mohamed Ellayas* v. *Rahima Bee*[4], that where an order is unfavourable to the plaintiff, it may result in great hardship to him and the interests of justice may demand that the High Court should at once rectify the error without waiting till the suit is finally decided and an appeal is then filed. In *Manaithunainatha Desikar* v. *Gopala Chettiar*[5], Burn, J., held that the determination of the proper court-fee payable in a suit is a matter within the jurisdiction of the Court. He distinguished the case of *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1], on the ground that there was no refusal to proceed with the case unless the court-fee were first paid, and he took the view that an order calling for additional court-fee is not necessarily without jurisdiction merely because the order which is bound to follow a refusal to pay it may be without jurisdiction. In *Ratnavelu Pillai* v. *Varadaraja Pillai*[6], Chandrasekhara Ayyar, J., held that an order calling upon the plaintiff to pay additional court-fee amounted to a refusal to proceed with the suit until the proper sum is paid and could be interfered with by the High Court in revision. In the case of *Ramaswami* v. *Rangachariar*[7], the correctness of the court-fee was taken up in revision before a Full Bench of five Judges. At the outset the learned Chief Justice specifically asked the Government Pleader whether he was taking a preliminary objection that revision would not lie, but the objection was not taken and the matter was decided on the merits in view of the importance of the question raised. The Allahabad High Court has held that the decision of the trial Court on the court-fee payable is not an independent proceeding and is not open to revision and there are also other decisions that a finding on the sufficiency of the court-fee is not "a case which has been decided" within the meaning of section 115, Civil Procedure Code.

There is also considerable room for the argument that questions of hardship or the interests of justice are quite outside the scope of section 115 of the Code. Revision is a statutory remedy and the requirements of the section must be strictly complied with before it can be invoked.

The decision of the Bench in *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1], is binding upon me but as there has been considerable difference of opinion and as distinctions have been drawn between the case of a plaintiff and a defendant, it seems necessary that the question should be reconsidered.

I accordingly direct the papers to be placed before the Honourable the Chief Justice with a view to the point being further considered.

(In pursuance of the aforesaid Order of Reference, the matter came on for hearing before the Chief Justice, Mockett and Lakshmana Rao, JJ., and the Court expressed the following)

OPINION.—The petitioner filed a suit in the Court of the Subordinate Judge of Ellore for the partition of the property of the joint family of which he was a member. He valued his suit for the purposes of jurisdiction at Rs. 69,804-4-6 and he paid a court-fee of Rs. 100 under Article 17 (*b*) of the Court-Fees Act. He claimed *inter*

* 20th October, 1943.

1. (1927) 55 M.L.J. 345 : I.L.R. 51 Mad. 664.
2. (1929) 56 M.L.J. 394.
3. (1933) 65 M.L.J. 25 : I.L.R. 56 Mad. 744.
4. (1929) 56 M.L.J. 302.
5. (1939) 1 M.L.J. 317.
6. (1942) 1 M.L.J. 569.
7. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.).

*alia* a share in certain lands which stood in the names of defendants 7 to 16. The lands had belonged to the family; but had been sold for arrears of land revenue. The purchasers at the auctions were defendants 7 to 16. The plaintiff alleged that in buying the lands these defendants were acting on behalf of the joint family and therefore were mere *benamidars*. The Court-fee Examiner considered that with regard to this part of the claim the plaint should be stamped under section 7 (5) of the Court-Fees Act and the Subordinate Judge agreed with this opinion. The plaintiff then filed the present petition for revision of the Subordinate Judge's order requiring him to pay the additional court-fee. He relied on the judgment of this Court in *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1]. The petition came before Byers, J., who formed the opinion that *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1] required reconsideration. As *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1] was decided by a Division Bench, the matter has been placed before a Full Bench. Having heard the arguments we are satisfied that the judgment should not be disturbed.

In *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1], Kumaraswami Sastriar and Wallace, JJ., held that an application lay to the High Court for the revision of an order passed by a lower Court where that Court had erroneously directed the plaintiff to pay an additional court-fee. The insistence on the payment of the additional court-fee amounted in the circumstances to a refusal to exercise jurisdiction. The mere fact that an appeal would lie later from the consequential order passed by the Subordinate Judge if the stamp fee were not paid was no ground for refusing to entertain the petition. The same question has been previously considered by Venkatasubba Rao, J., Krishnan, J., Phillips, J., and Waller, J., all sitting alone, and their judgments disclosed a conflict of opinion, but the decision in *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1], settled the dispute so far as this Court was concerned until 1938.

In *Kattia Pillai* v. *Ramaswamia Pillai*[2], Venkatasubba Rao and Reilly, JJ., agreed that the High Court could revise an order directing a plaintiff to pay an additional court-fee, but held that it should not interfere if the order was favourable to the plaintiff, that is, an application for revision would not lie at the instance of a defendant who had unsuccessfully questioned the court-fee paid on the plaint. The High Court could, however, interfere at the instance of a defendant if the question raised by him went beyond the amount of court-fee payable and related to the jurisdiction of the Court to try the case. In *Secretary of State for India* v. *Raghunathan*[3] the Government which was not a party to the suit applied for the revision of an order with regard to the stamping of the plaint. The order was favourable to the plaintiff. Beasley, C.J., and Bardswell, J., held that the application did not lie. The case of *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1] was quoted with apparent approval.

In view of these three Bench decisions one would have thought that the question of a plaintiff's right to apply for revision against an erroneous order requiring him to pay a further court-fee had been set at rest. But unfortunately it had not. The same question was raised in a case heard in 1938 by Burn, J., in *Manaithunainatha Desikar* v. *Gopala Chettiar*[4]. The learned Judge held that where a trial Court had determined the proper court-fee payable on the plaint and had held it to be insufficiently stamped, the order could not be revised by the High Court. He distinguished the case before him from that in *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1] on the ground that there had been no refusal to proceed with the suit. We consider that it is very regrettable that Burn, J., did not accept the principle laid down in *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1], a decision which was binding on him, and we agree with the observation of Chandrasekhara Ayyar, J., in *Ratnavelu Pillai* v. *Varadaraja Pillai*[5], that the facts in the case before Burn, J., could not really be

1. (1927) 55 M.L.J. 345: I.L.R. 51 Mad. 664.
2. (1929) 56 M.L.J. 394.
3. (1933) 65 M.L.J. 25 : I.L.R. 56 Mad. 744.
4. (1938) 1 M.L.J. 317.
5. (1942) 1 M.L.J. 569.

distinguished from those in *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1]. The question may be a debatable one, but there must be finality somewhere and three Division Benches had in effect repudiated the opinion which found favour with Burn, J. These decisions were final so far as the learned Judge was concerned.

Moreover the opinion expressed by this Court in *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1], is shared by the High Courts of Calcutta, Bombay, Lahore and Patna. In 1910 in *Ramrup Das* v. *Mohand Shiyaramdas*[2], the Calcutta High Court held that a plaintiff against whom an adverse order had been passed with regard to the court-fee payable on the plaint could move the High Court in revision without waiting for the dismissal of the suit for non-compliance with the order. This judgment was considered in *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1]. The Calcutta High Court interfered at the instance of a plaintiff in *Shailendranath Kundu* v. *Surendranath Sarkar*[3] and in *Falkner* v. *Mirza Mohamed Syed Ali*[4], it was held that an application for revision did not lie at the instance of a defendant. The Bombay, Lahore and Patna cases are *Vithal Krishna* v. *Balkrishna Janardan*[5], *Gurdevi deceased, represented by Prithiviraj Khosla* v. *Mohamed Baksh*[6], which overruled *Lalchand Mangalsen* v. *Beharilal Mehrchand*[7] and *Ramkhalawansahu* v. *Bir Surendrasahu*[8] respectively. The only High Court which has expressed an opinion contrary to *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1] and adhered to it is the Allahabad High Court. See *Gupta and Co.* v. *Kirparam Brothers*[9].

We hold that a revision petition lies when a Court subordinate to the High Court has held that the plaintiff has inadequately stamped his plaint, but that a petition for revision does not lie when a defendant has unsuccessfully challenged the adequacy of the stamp affixed by the plaintiff unless a further question of jurisdiction is involved. This means that we affirm the decisions of this Court in *Kolandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[1] and *Kattia Pillai* v. *Ramaswami Pillai*[10].

The petition now before us will be remanded to Byers, J., for decision on the merits, viewed in the light of this judgment. The costs of the hearing before us will be made costs in the petition.

K.S. — *Reference answered.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING AND MR. JUSTICE SHAHABUDDIN.

Palaniappa Chettiar and another .. *Appellants**

*v.*

L. P. L. P. Narayanan Chettiar and another .. *Respondents.*

*Civil Procedure Code (V of 1908), section 13—Foreign judgment—Conclusiveness—Direct adjudication—Test.*

In a suit for partition of family properties consisting of among other things certain money-lending businesses which were carried on in Burma by the first defendant it was pleaded in defence that in a partition suit brought by the first defendant in Burma in respect of those businesses a preliminary decree had already been passed and that under section 13 of the Civil Procedure Code, it was conclusive in regard to the question of the division of such businesses. It was contended by the plaintiffs that though they raised several questions in their written statement in the Burma suit the learned Judge of that Court had given no decision on them and that hence they were not in the words of section 13 "directly adjudicated upon".

1. (1927) 55 M.L.J. 345: I.L.R. 51 Mad. 664.
2. (1910) 14 C.W.N. 932.
3. (1934) I.L.R. 62 Cal. 417.
4. (1924) 29 C.W.N. 627.
5. (1886) I.L.R. 10 Bom. 610 (F.B.).
6. I.L.R. (1943) Lah. 257 (F.B.).
7. (1924) I.L.R. 5 Lah. 288 (F.B.).
8. (1937) I.L.R. 16 Pat. 766 (F.B.).
9. (1934) I.L.R. 57 All. 17.
10. (1929) 56 M.L.J. 394.

* Appeal No. 2 of 1943. 28th January, 1944.

*Held*, that it cannot be contended that in order for any matter to be directly adjudicated upon there must be a positive discussion of evidence relating to that matter. If any claim is made by any party and subsequently abandoned at the trial of the suit and if the decree in that suit necessarily implies that that claim has not met with acceptance at the hands of the Court, then the Court must be deemed to have directly adjudicated against it. The Court in Burma had in that sense adjudicated that the plaintiff shall not be entitled to call upon the first defendant to account in respect of the businesses in Burma and hence under section 13, Civil Procedure Code, that adjudication was conclusive on this point.

Appeal against the decree of the Court of the Subordinate Judge of Devakottai in O.S. No. 80 of 1942.

*B. Sitarama Rao* and *T. Krishna Rao* for Appellants.

*K. V. Krishnaswami Aiyar* and *R. Ramasubbu Aiyar* for Respondents.

The Judgment of the Court was delivered by

*King, J.*—This appeal arises from a suit by two Nattukottai Chetties, who are father and son, against the first plaintiff's brother, the first defendant, and the widow of the first plaintiff's father. The father of the first plaintiff and the first defendant died in 1930. The suit was laid in the Court of the Subordinate Judge of Devakottai and the properties alleged to be those of the family in schedules A and B were admittedly situated within his jurisdiction. By far the greater part of the family (properties) consisted in certain money-lending businesses which were being carried on in Burma. It was contended by the first defendant that the Subordinate Judge had no jurisdiction to deal with these properties. It was pointed out in the second place that a Civil Court in Burma had already at the instance of the first defendant taken cognizance of a suit for partition in regard to the properties situated in Burma and that it had passed a preliminary decree. It was contended therefore that under section 13, Civil Procedure Code, that preliminary decree was conclusive in regard to the question of the division of the businesses in Burma. On both these points, the learned Subordinate Judge held in favour of the contentions of the first defendant. He accordingly refused to consider the properties mentioned in schedule C and decided to proceed with the suit only in so far as schedules A and B were concerned. It is against this decision that the plaintiffs have filed the present appeal. We have heard the learned advocate for the plaintiffs only on the question of the applicability of section 13 and as we agree with the decision of the learned Subordinate Judge on that point, we have considered it unnecessary to discuss the question whether the Court had jurisdiction on the ground that Burma is no longer a part of British India.

The main portion of the claim in respect of the businesses in Burma made in this suit is that they were under the management of the first defendant for the period from the death of his father in 1930 until 1938 and that therefore the first defendant ought to account to the plaintiffs for his management during that period. Various instances of misapplication of the family funds by the first defendant were alleged. The same point was raised before the Court in Burma in paragraph 14 of the written statement filed in the Burma suit by the present first plaintiff. It is contended in support of this appeal that although this matter was no doubt raised in the written statement, the learned Judge in Burma has given no decision upon it. In one sense that contention is undoubtedly true. There is no discussion whether the allegation made in the written statement in Burma is true or false ; but this is for the obvious reason that at the trial which followed upon the pleadings the present first plaintiff obviously did not insist upon any issue being framed or any evidence being led on this question. It cannot be denied that no relief of any kind is granted by the preliminary decree to the present appellants in regard to the conduct of the businesses between 1930 and 1938. What is now argued in appeal is that because the preliminary decree gives no express decision on this contention of the appellant, it is not, in the words of section 13, "directly adjudicated upon."

We are unable to accept the contention that in order for any matter to be directly adjudicated upon there must be a positive discussion of evidence relating to that matter. It seems to us that if any claim is made by any party and subse-

quently abandoned at the trial of a suit and if the decree in that suit necessarily implies that that claim has not met with acceptance at the hands of the Court, then the Court must be deemed to have directly adjudicated against it. There can be no doubt that in this sense the Court in Burma has adjudicated that the present appellants shall not be entitled to call upon the present first respondent to account for his management of the businesses during the years 1930 to 1938. We are of opinion therefore that under the provisions of section 13 this adjudication by the Court in Burma is conclusive on this point and therefore that the learned Subordinate Judge of Devakottai was right in refusing on this ground to enter into any enquiry upon it. This is sufficient to dispose of the present appeal which must be dismissed with costs of the first respondent.

V.S. *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

The Official Receiver, Cuddapah .. *Appellant**

*v.*

Nichnametla Subbamma, widow of Nagiah and another .. *Respondents.*

*Provincial Insolvency Act (V of 1920), section 51 (1), Exception—Scope—"Realised in execution"—Construction—Mere filing of petition by executing decree-holder not sufficient to convert money lying to credit of suit into assets realised in execution.*

The filing of an execution petition cannot convert a sum (lying to the credit of the suit) into assets realised in execution or effect a transfer of the money from the credit of the suit to that of an execution petition. Such a conversion or transfer can only be by an order of Court. If before such order, the debtor is adjudicated an insolvent the decree-holder cannot claim any preferential right under the exception to section 51 (1) of the Provincial Insolvency Act.

Case-law reviewed.

Appeal against the order of the District Court of Cuddapah dated 13th February, 1943 and made in A. S. No. 21 of 1942 (E. A. No. 103 of 1941 in O. S. No. 539 of 1934, District Munsiff's Court, Nandalur).

*M. Srinivasa Rao* for Appellant.

*Ch. Raghava Rao* for Respondents.

The Court delivered the following

JUDGMENT.—In O. S. No. 539 of 1934, a suit for money, a certain quantity of indigo belonging to the defendant was attached before judgment; and as this was liable to deterioration it was sold, which meant that the attachment fastened itself to the money. A decree was passed on the 14th September, 1935. On the same day, a cheque petition was filed, E. A. No. 600 of 1935, praying that a cheque might be issued for the sum attached. Within a fortnight or so, on 2nd October, 1935, the judgment-debtor filed an insolvency application, which was admitted two days later. On the 10th October, the Official Receiver wrote a letter to the Court, drawing its attention to the fact that the property had become vested in him and asking the Court not to proceed any further. It seems that the defeated claimants had moved the High Court to pass an injunction restraining the decree-holder from drawing the money. In consequence of an endorsement on the cheque petition that it was not pressed for the present, the petition was dismissed on 31st October, 1935. On 4th March, 1936, the judgment-debtor was adjudicated an insolvent. The money realised by sale of the indigo is claimed by the Official Receiver as a sum of money still belonging to the judgment-debtor, although it was attached. The decree-holder claims the same money by virtue of the exception to section 51 (1) of the Provincial Insolvency Act, as being assets realised in the course of execution, which are exempt from the general rule that no decree can be executed against the property of the debtor. Both the Courts below held in favour

* A. A. A. O. No. 181 of 1943. 1st February, 1944.

of the decree-holder and dismissed the application of the Official Receiver for the issue of a cheque.

I have perused the few endorsements on the back of E. A. No. 600 of 1935; and it does not appear that anything was done at all on the petition, except to adjourn it from time to time and finally to dismiss it. It is therefore difficult to understand how the sum of money in question can possibly be said to have been realised in execution, when nothing was done in execution beyond the filing of a petition. It would also seem that section 51 will not apply; because execution of the decree had not issued against the property, for execution cannot issue unless there is an order to execute, or on an execution application some order has been passed from which such an order can be inferred. The trial Court seemed to think that the mere filing of a petition was enough to convert the amount lying to the credit of the suit into assets realised in execution; but there can be no doubt at all that the filing of an execution petition cannot convert a sum into assets realised in execution or effect a transfer of the money from the credit of a suit to that of an execution petition. Such a conversion or transfer can only be by an order of Court. The lower appellate Court seems to base its decision merely on equitable considerations, saying that if there had not been an order of the High Court granting an injunction against the drawing of the money, the decree-holder would have drawn the money and that he ought not to suffer because of this injunction order.

As it seems so clear that nothing was done in execution at all and that money was not realised in execution, there seems to be little more to say; but as the matter has been discussed at length and various decisions quoted, it is perhaps desirable that a few words be said about the cases cited. One very much in point is *Nachiappa Chettiar* v. *Subbier*[1]. In that case, as in this, some property was first attached before judgment which was subsequently converted into cash; and three other decree-holders sought to attach it. The question was whether they could divide the assets before the person who had attached it before judgment. The meaning of the words "assets held by a Court" and "before receipt of such assets" came up for consideration; and the learned Judges had to decide at what moment a sum of money under attachment in the suit itself became assets held and received by the executing Court. All three Judges agreed that that point was when an order for rateable distribution was passed. Wallace, J., says:

"When the sale proceeds are already in Court prior to the decree it must be that they cannot become assets before (1) the debtor becomes a judgment-debtor, and (2) execution is taken out against them either by a judgment-creditor entitled by decree . . . . or by a judgment-creditor entitled, by an order of Court transferring the fund to the credit of his suit, to put in a valid execution application. It is only then at the earliest that they can become assets held and received in execution, but it does not follow that it is then that they do become so. The point of time of the conversion is the point of time at which the Court says 'I, as attaching Court, take this property of the judgment-debtor lying in this Court as custody Court and make it property available for distribution in satisfaction of decree against him' . . . . ."

In other words, some act or order of the Court is necessary before assets to the credit of suit become assets realised in execution. The *Official Receiver of Tanjore* v. *Venkatarama Aiyar*[2] is a case in which the question arose whether, upon an order for rateable distribution having been passed, only the amount credited to the attaching decree-holder was affected by section 51 (1) of the Provincial Insolvency Act, or the whole of the amount rateably distributed. These learned Judges also found it necessary to consider the point at which the conversion to assets in execution could be treated as assets realised in execution; and they held that from the time of the order of rateable distribution, the money ceased to belong to the judgment-debtor and became assets of the decree-holder.

The lower appellate Court quoted a decision of Patanjali Sastri, J., in *Guruvayya* v. *Official Receiver, Guntur*[3]; but that was an obvious case of realisation of assets in execution, because the property had been attached and sold in execution and the

1. (1923) 44 M.L.J. 413: I.L.R. 46 Mad. 506 (F.B.).
2. (1921) 42 M.L.J. 361.
3. (1941) 1 M.L.J. 405.

money brought into Court. I do not think *Subramaniam Chetti* v. *Sankara Aiyar*[1] has any bearing on the case, as the point now under consideration was not there discussed at all. It is argued by Mr. Raghava Rao that *Nachiappa Chettiar* v. *Subbier*[2], which is based on the wording of section 73, cannot be a very safe guide for the interpretation of the words of section 51; and that it would be safer to refer to decisions based on the old Civil Procedure Code. He has referred to *Manilal Umedram* v. *Nanabhai Maneklal*[3], which deals with the interpretation of section 295 of the old Procedure Code, in which the words used are "assets realised by sale or otherwise in execution of a decree," which are very similar to the wording of section 51 of the Provincial Insolvency Act. I do not however find that *Manilal Umedram* v. *Nanabhai Maneklal*[3] lays down any principle at variance with the Full Bench decision in *Nachiappa Chettiar* v. *Subbier*[2]. There is a discussion in that case of the meaning of "realised"; but the learned Judges make it clear that the assets must be realised in the course of execution. I do not find any remarks in that judgment which suggest that money attached before judgment can be deemed to be money realised in execution by the mere passing of the decree or by the filing of an execution petition. Moreover, *Nachiappa Chettiar* v. *Subbier*[2], following *Viswanathan Chetti* v. *Arunachalam Chetti*[4], another Full Bench decision of this Court, held that the words "assets held by a Court" meant only the assets "levied in execution"; and the learned Judges thereupon considered whether in the case before them money had been "levied in execution." So the difference between the meaning of the words used in section 73, Civil Procedure Code, and those in section 51 of the Provincial Insolvency Act is only that between "levied in execution" and "realised in execution," a difference not easily recognised.

The appeal is allowed with costs throughout, and the petition of the Official Receiver granted.

K.S. — *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Sri Sri Satya Pragnya Teertha Swamulu Varu, by power-of-attorney, agent, Markapuram Srinivasacharlu .. *Appellant**

*v.*

Kandala Ramamurthy and others .. *Respondents.*

*Madras Agriculturists' Relief Act (IV of 1938), section 15 (2)—Applicability—"If instituted would have stood so stayed"—Interpretation—Arrears of rent for fasli 1345—Stay of proceedings for recovery up to 1st November, 1936, by Act of Legislature amending Madras Estates Land Act—Existence of interval up to the coming into force of Madras Act IV of 1938 when proceedings could have been taken—Effect—Section 15 (2) of Act IV of 1938 inapplicable to such a case.*

The words "proceedings if instituted would have stood so stayed," in section 15 (2) of Madras Act IV of 1938 indicate that the staying by Legislative action of the proceedings is the necessary consequence of their institution. The arrears of rent for fasli 1345 in the present case accrued due on 15th January, 1936, and a suit filed in the Civil Court for those arrears at any time prior to 31st October, 1936, would necessarily have been stayed, because of the Acts which successively amended the Madras Estates Land Act—Acts (VIII of 1934), (I of 1936), (XIII of 1936) and (XVIII of 1936). But after the 1st November, 1936, there was a period extending up to 31st March, 1938, when Act IV of 1938 came into operation and a fresh Legislative stay began to come into force, during which the arrears for fasli 1345 might have been claimed by the landlord. In a suit for the recovery of arrears of rent for fasli 1345 filed on the 11th March, 1940 (after the tenant had paid the arrears for faslis 1346 and 1347 as provided by section 15 (1) of Act IV of 1938) claiming that it was not cancelled by the operation of section 15 (2) of Act IV of 1938,

*Held*, that section 15 (2) has no application to cases like the present one in which the landlord had ample time to realise the arrears after the Legislative stay had ceased to operate and before Madras Act IV of 1938 came into force. It cannot be said that if a suit for such arrears had been instituted, it would have been stayed by the operation of Madras Act XVIII of 1936 and the preceding amending Acts.

1. (1922) 15 L.W. 531.
2. (1923) 44 M.L.J. 413 : I.L.R. 46 Mad. 506 (F.B.).
3. (1903) I.L.R. 28 Bom. 264.
4. (1920) 39 M.L.J. 608 : I.L.R. 44 Mad. 100 (F.B.).

* S. A. No. 55 of 1943. 11th February, 1944.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in A. S. No. 41 of 1941, preferred against the decree of the Court of the District Deputy Collector of Peddapur in L. S. No. 157 of 1940.

*A. Gopalacharlu* for Appellant.

Respondents not represented.

The Court delivered the following

JUDGMENT.—This appeal involves a question of the interpretation of section 5 (2) of Madras Act IV of 1938. The appellant filed a suit in the Revenue Court claiming arrears of rent for fasli 1345 and for fasli 1348. It is common ground that the arrears for faslis 1346 and 1347 were deposited within the time contemplated in section 15 of the Act. There is no dispute regarding the arrears for fasli 1348. Both the Courts below have held that the suit for fasli 1345 is barred by the cancellation of previous arrears under section 15 of Act IV on the payment within the proper time of the rent for faslis 1346 and 1347. The appellant contends that by the operation of sub-section (2) of section 15 of the Act, the arrears for fasli 1345 are not cancelled. This sub-section is not very easy to construe and so far as I know, it has not been the subject of any judicial interpretation by this Court. Omitting the words with which we are not concerned it runs as follows :

"Nothing contained in sub-section (1) shall be deemed to effect a discharge of arrears of rent which accrued due for fasli 1345 if proceedings for the recovery of such arrears stood stayed by an Act of the Legislature or by an order of a Court or if such proceedings, if instituted, would have stood so stayed."

In the present case, there were no proceedings for the recovery of arrears for fasli 1345 until the present suit was filed on the 11th March, 1940. So this cannot be a case in which the proceedings have been stayed by an Act of the Legislature or by an order of the Court. It can only come, if at all, under the third clause as one of proceedings which, if instituted, would have stood so stayed.

The relevant Acts of the Legislature are the four Acts which successively amended the Madras Estates Land Act. Section 127 of Act VIII of 1934 prohibited the ejectment of tenants in inam villages up to 1st November, 1935, and also directed the stay up to the same date of all proceedings in which the ownership of the kudiwaram by the inamdar was in issue. By Act I of 1936, the date 1st November, 1935, was extended to 1st May, 1936. By Act XIII of 1936, the date was again extended to 1st November, 1936, and finally, by Act XVIII of 1936, the date was fixed as the commencement of that Act which is, 31st October, 1936. The result therefore was that any proceeding involving the determination of the ownership of the kudivaram by the inamdar, if filed between May, 1934 and the end of October, 1936, would necessarily have been stayed by the operation of this series of statutes.

Turning to the facts of the present case, we find that the appellant in August, 1935, filed a suit for arrears on the same holding for faslis 1342, 1343 and 1344. The suit was instituted in the Civil Court and the plaint was returned for presentation to the revenue Court. It was actually presented on 24th November, 1936, after Act XVIII of 1936 came into operation. The arrears for fasli 1345 accrued due on 15th January, 1936. A suit filed in the Civil Court for those arrears at any time prior to 31st October, 1936, would necessarily have been stayed. But after the 1st of November, 1936, there was a period, extending up to the 31st March, 1938, when Act IV of 1938 came into operation and a fresh Legislative stay began to come into force, during which the arrears for 1345 might have been claimed by the landlord. The appellant contends that because a suit for these arrears, if it was instituted before the 1st of November, 1936, would have been stayed, the arrears for fasli 1345 are immune from cancellation under section 15 (1) of the Act. That is to say, the appellant really wants to read instead of the words "if instituted would have stood so stayed," the words "if instituted, might have stood so stayed." The word "would" standing in the second portion of a conditional sentence in the past tense normally implies that if the condition in the first portion happens, the result contemplated in the second portion will inevitably follow. For instance, in

the sentence " if it rained, he would get wet," we mean not that if it rained, he would perhaps get wet, but that if it rained, he would certainly get wet. In ordinary English, if after the condition a mere problematic result is anticipated, we should use the word " might " and not the word " would". Supposing in the sentence quoted, we did not know whether the person had or had not got an umbrella, we should say, " if it rained, he might get wet," because we did not know whether the umbrella would save him from getting wet or not. If, on the other hand, we were quite sure that he had not got an umbrella or any means of shelter, we should say, " if it rained, he would get wet."

Therefore in ordinary English, the words " proceedings if instituted, would have stood so stayed," seem to indicate that the staying by Legislative action of the proceedings is the necessary consequence of their institution. It has been suggested that this interpretation robs the clause of all effect and that all proceedings for the arrears for fasli 1345 affected by Act IV of 1938 must be such as might or might not have been filed at such a time as to bring into force the Legislative stay. I do not think this contention is correct. There are many proceedings under the Estates Land Act for which very short periods of limitation are prescribed. For instance, the period to contest the right of sale of a holding under section 112 of the Act is only thirty days. It might well be that such proceedings would involve the question of the right of the inamdar to the kudivaram. If the landlord, in the present case, had proceeded immediately to bring the holding to sale for the arrears for fasli 1345 and the tenant had wished to object contending that the holding was not one under the Estates Land Act, he would have had to file the proceedings at a time when they would have been futile because of the bar under Act XVIII of 1936 and the preceding Acts. It is to meet the case of the landlord necessarily abstaining from filing proceedings because such proceedings would be futile in view of the Legislative stay, that this clause appears to have been enacted. It seems to have no application to cases in which the landlord had ample time to realise the arrears after the Legislative stay had ceased to operate and before Madras Act IV of 1938 came into force. In this view, I hold that it cannot be said of the present case that, if a suit for the arrears of fasli 1345 had been instituted, it would have been stayed by the operation of Act XVIII of 1936 and the preceding amending Acts.

The appeal is, therefore, dismissed with costs.

Leave to appeal is refused.

K.S. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT AND MR. JUSTICE BELL.

Indo-Commercial Bank, Limited, through its Managing Director, S. N. N. Sankaralinga Ayyar .. *Appellant**

*v.*

Kuberan Namboodiri's son Narayanan Nambudiri .. *Respondent.*

*Madras Nambudri Act (XXI of 1933), section 23—Husband and wife separating from* illom—*Status of—Cannot claim partition* inter se—*Share of either—Cannot be proceeded against in execution of a decree.*

Under the Madras Nambudri Act a married man who is a member of an *illom* is entitled to claim a partition but must do so on behalf of himself and his wife. They receive their respective shares jointly and apart from the circumstance of a change of religion arising, neither of them may claim partition from the other. That places an insuperable obstacle in the way of a decree-holder seeking to execute his decree against a married member of an *illom* who has partitioned from the rest of the family. The reason is that by the terms of the statute the only remedy available to a decree-holder, namely, to attach and sell the right, title and interest of a co-sharer and having purchased, to compel partition as against the other co-sharers, is expressly denied.

In the matter of *Narayanan Nambudiri,* (1940) 2 M.L.J. 747, considered and explained.

* A. A. O. No. 45 of 1943. 17th February, 1944.

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Palghat dated 4th September, 1942 and made in E. P. No. 29 of 1941 in O. S. No. 17 of 1931.

*S. Panchapakesa Sastri* and *C. D. Venkataraman* for Appellant.

*P. Govinda Menon* for Respondent.

The Court delivered the following

JUDGMENTS : *Mockett, J.*—The appellant, the Indo-Commercial Bank, Ltd., was the second petitioner, assignee decree-holder, in the lower Court. The respondent was the second defendant in the suit and the second respondent in the lower Court. The petition before the Court was by the assignor and the assignee to record an assignment of the decree and to attach the share of defendants 2 and 3 in the *illom* properties. The learned Subordinate Judge made an order of attachment against the share of the third defendant but refused to make such an order against the share of the second defendant. Hence this appeal by the Indo-Commercial Bank, Ltd.

The second and the third defendants are Nambudiri Brahmins and members of an *illom.* Their legal position is defined by the Madras Nambudiri Act (XXI of 1933). The following dates are relevant. On the 2nd September, 1932, the decree was passed. On the 1st August, 1933, Act XXI of 1933 came into force. Sometime in 1937 the second defendant married a Nambudiri woman. On the 18th March, 1940, there was a partition in the *illom* and in the words of paragraph 4 of the counter-statement of the respondent " this defendant, his legally wedded wife and children and the third defendant are living as a separately divided branch of the mana." By paragraph 7 of the same statement he denied the liability of his share for attachment, he himself, " not being entitled to ask for partition save with the consent of his legally wedded wife." It may be stated at once that no question of a Nambudiri wife's consent arises. What we have to decide is whether the plea that, the respondent being married, he himself has no right to claim partition and consequently neither has an execution petitioner is a good answer to an execution petitioner seeking to sell his share. The learned Subordinate Judge of South Malabar held that the plea was good and that the respondent's share could not be attached. The decision of this civil miscellaneous appeal depends upon a construction of sections 2, 23, 24 and 25 of the Madras Nambudiri Act. Section 2 deals with definitions, but the explanation to the definition of " *illom* " is important. It reads thus :

" A female shall on her marriage cease to be a member of the *illom* in which she was born and become a member of the *illom* of her husband."

It follows that on their marriage the respondent and his wife were both members of the husband's *illom,* he by birth, she by marriage. This must be borne in mind in view of the wording of the proviso to section 23. Section 23 is as follows :

" (1) Any member of an *illom,* male or female, may claim to take his or-her share of all the properties of the *illom* over which it has power of disposal and separate from the *illom* :

Provided that where a male member of an illom whose wife is also a member thereof claims to separate from the *illom,* he shall do so on behalf of himself and his wife and the shares of the husband and wife shall be allotted to them jointly ; and save as provided in section 24, neither the husband nor the wife shall be entitled to claim partition from the other.

(2) (*a*) A member of an *illom* separating from it under sub-section (1) shall be entitled to such share of the *illom* properties as would fall to him or her if a division *per capita* were made among all the members of the *illom* then living.

(*b*) A husband and wife separating from an *illom* under the proviso to sub-section (1) shall be entitled to such share of the *illom* properties as would fall to them if a division *per capita* were made among all the members of the *illom* then living."

Sub-section 3 is not relevant. The section gives every member, male or female, of an *illom* a right to claim partition. But under the proviso when a male member having a wife who is also a member of the *illom,* as is the case before us, claims for partition, he does so on behalf of himself and his wife and the allotment of the

shares is made to them jointly. The concluding sentence is of great importance as it expressly denies to the husband and the wife the right to claim partition from each other. The result is that though separate from the rest of the *illom* and in effect forming a new *illom* consisting of each other, neither is permitted to claim the right to partition his or her share, the shares being joint and indivisible. Marriage does not prejudice either the husband or wife from receiving their share [*vide* section 23 (2) (*b*)]. The prohibition against partition by a husband or wife is almost emphasised by the fact that they are expressly allowed to claim partition only if either of them should change his or her religion. [Section 23 (1) proviso read with section 24.] The proviso to section 25 does not assist in the determination of this appeal. It would appear to make the provisions of chapter II applicable to shares obtained by a husband and wife separating under the proviso to sub-section (1) of section 23. The position therefore is clear beyond doubt, namely, a married man is entitled to claim a partition but must do so on behalf of himself and his wife. They receive their respective shares jointly and apart from the circumstance of a change of religion arising, neither of them may claim partition from the other. That, in my view, places an insuperable obstacle in the way of a decree-holder seeking to execute his decree against a married member of an *illom* who has partitioned from the rest of the family. The reason is that by the terms of the statute the only remedy by a decree-holder, namely, to attach and sell the right, title and interest of a co-sharer and having purchased, to compel partition as against the other co-sharers, is expressly denied. This remedy, as laid down by the Judicial Committee in *Deendyal Lal* v. *Jugdeep Narain Singh*[1] is always available to an executing creditor in cases where the judgment-debtor himself has a right to claim partition, but when, as in the case before us, there is no right to compel partition, it seems to me that the purchaser acquires nothing if he purports to buy the right, title and interest of a married Nambudiri co-sharer who has partitioned from the family.

It has however been argued that In the matter of *Narayanan Nambudiripad*[2], Patanjali Sastri, J., has generally decided that there is no restriction at all on the right (in that case) of the Official Assignee, to bring the interest of an insolvent member of an *illom* to sell on behalf of his creditors. It is clear from the judgment that the only point argued before the learned Judge was whether from a reading of the Madras Nambudri Act, it could be derived that there was a general restriction on the right of execution by sale of the interest of an insolvent member. That was all that was decided and with that decision I am in complete agreement. It was argued however in the lower Court that an investigation of the record in the case before Patanjali Sastri, J., showed that in fact the insolvent was married. I have consulted my learned brother, Patanjali Sastri, J., and he confirms, what I think is evident, that this aspect was never mentioned in Court and was never in the minds of any one concerned in the case. The decision in In the matter of *Narayanan Nambudiripad*[2] is therefore authority, with which I am in complete agreement, only for the general proposition contained in the headnote and in the judgment. The learned Subordinate Judge before whom the above case was cited rightly formed the view that the point before him relevant to the marriage of the judgment-debtor was not considered by Patanjali Sastri, J., and held that the share of the respondent, second defendant, was not attachable. The effect of section 23 is that in the circumstances of this case there was nothing to sell as the only remedy open to an executing creditor, namely, the right to compel a partition could not be enforced under the provisions of section 23.

The result is that this appeal must be dismissed with costs.

*Bell, J.*—I agree.

K.S. —— *Appeal dismissed.*

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1. (1877) L.R. 4 I.A. 247 : I.L.R. 3 Cal. 198 (P.C.).
2. (1940) 2 M.L.J. 747.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR.

Ghosh Beevi .. *Appellant.**

*Court-Fees Act (VII of 1870), section 7, clause* (iv) (d) *and Suits Valuation Act (IV of 1887), section 8—Suit for permanent injunction filed before amendment—Second appeal filed after amendment—What is the proper court-fee.*

Where, in a suit for permanent injunction restraining the defendants from trespassing on land in the lawful possession of the plaintiff, the plaintiff valued the suit for purposes of court-fee and jurisdiction under section 7, clause (*iv*) (*d*) of the Court-Fees Act read with section 8 of the Suits Valuation Act, but the second appeal arising out of this suit was filed by the appellant (plaintiff) after the notification under section 9 of the Suits Valuation Act had been issued by the High Court directing a change in the method by which the subject of a suit of the character herein question is to be valued for the purposes of court-fee and jurisdiction. On the question, what is the proper court-fee to be paid in second appeal,

*Held,* that the proper court-fee should be that calculated in accordance with the amendment.

*Daivanayaka Reddiar* v. *Renukambal Ammal,* (1927) 53 M.L.J. 637 : I.L.R. 50 Mad. 857 (F.B.) and *Dhirta* v. *Kesri,* (1907) 3 I.C. 484, distinguished.

Second appeal sought to be preferred to the High Court against the decree of the District Court of Ramnad at Madura in A. S. No. 681 of 1942, preferred against the decree of the Court of the District Munsiff of Paramakudi in O. S. No. 287 of 1941.

*R. Kesava Aiyangar* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

The Court made the following

ORDER.—The matter comes before me on a reference made by the Taxing Officer. The suit out of which the present second appeal has been sought to be preferred was instituted on the 13th December, 1941, for a permanent injunction restraining the defendants from trespassing on land alleged to be in the lawful possession of the plaintiff as a usufructuary mortgagee. The plaintiff valued the suit for the purposes of court-fee and jurisdiction on her own valuation at Rs. 100, a course which was open to her under section 7, clause (*iv*) (*d*) of the Court-Fees Act read with section 8 of the Suits Valuation Act. A decree was passed in favour of the plaintiff and thereupon the first defendant appealed to the District Court. The appeal was disposed of on 4th October, 1943, and it resulted in a reversal of the decree passed by the District Munsiff. The plaintiff is now endeavouring to file a second appeal and she filed her memorandum in this Court on the 3rd January, 1944. Between the date when the District Court passed its decree and the date when the second appeal was filed here, a notification has been issued by the High Court under section 9 of the Suits Valuation Act with the previous sanction of the Provincial Government directing a change in the method by which the subject-matter of a suit of the character here in question is to be valued for the purposes of court-fee and jurisdiction. The notification amongst others states :

"In suits for injunction, where relief is sought with reference to any immoveable property, on the ground that the defendant denies the title of the plaintiff to the property and disturbs or threatens to disturb the plaintiff's possession thereof, the value of the subject-matter of the suit shall not be less than half the value of the property calculated in the manner provided in section 7, paragraph 5 of the Court-Fees Act, 1870."

The intention behind the notification is to take away from the plaintiff or the appellant as the case may be the right he had under section 7 (iv) (*d*) to value a suit of this kind at his discretion at any amount he likes. This notification came into force on the 1st November, 1943, more than two months before the second appeal was filed. The question is whether the plaintiff-appellant is entitled to pay the same court-fee on his memorandum of second appeal as he originally paid when he filed the suit or whether he should pay a fee determinable according to the method indicated by the new notification.

* Stamp Register No. 654 of 1944. 25th February, 1944.

Mr. R. Kesava Aiyangar, the learned Advocate for the appellant, has contended that the value which was correctly fixed when the suit was instituted according to the law then in force continues to apply to the appeal and second appeal, in spite of alterations subsequently made. For this contention he relies on the decision of the Full Bench in *Daivanayaka Reddiar* v. *Renukambal Ammal*[1]. It is clear from the judgment of the Full Bench that the Court was then called upon to decide whether an amendment of the law made after the institution of the suit affected the right of appeal which the parties possessed as matters stood at the date of the suit. The Full Bench held that an amendment which came into force after the institution of the suit would not deprive the plaintiff of his right of appeal to the Court to which appeals lay at the date of the suit. There was no question raised there as to whether the alteration made in the court-fee payable applied to the appeal or not. If we look at the ground of the decision it seems clear that it proceeded on the well-known principle of law that the moment a suit is filed the plaintiff has a vested right of appeal to a particular tribunal which cannot be taken away by a subsequent enactment. This of course does not touch the question of court-fee in regard to which it is not possible to maintain that there is such a vested right.

Strong reliance is placed upon the following passage occurring at page 865 of the report, namely :

> " Presumably, the value of the subject-matter of the suit is its value at the time of filing. Such value has to be set forth in the plaint and court-fees paid accordingly. It is, however, contended that the value varies according to the particular enactment in force at the time ; and that, although it may have a particular value when it is filed, the value of the suit can be changed if the law in respect of valuation is altered. This contention was distinctly negatived so long ago as 1874 in *Muthuswami Pillai* v. *Muthu Chidambara Chetti*[2], where it was held that it is the money value of the original suit that fixes the jurisdiction throughout the subsequent litigation in its several stages. If this is so, the value of the subject-matter of the suit is the same throughout and it cannot be altered after the decree has been passed simply by an alteration in a fiscal enactment."

The last sentence in this extract clearly implies that the value of the subject-matter for the purpose of fixing the forum remains the same throughout and that it is not altered by a change in a fiscal enactment. The Full Bench had not to consider the effect of a fiscal enactment in so far as fiscal purposes are concerned and the ruling does not touch the question of court-fee. In the case before me the question is not a question of forum but a question of pure court-fee. The same remarks apply to the decision of the Punjab Chief Court in *Dhirta* v. *Kesri*[3].

The notification having taken effect on the 1st November, 1943, I can see no reason why it should be held inapplicable to an appeal preferred after it came into force. It follows that the court-fee payable in respect of the memorandum of second appeal must be calculated and paid in the manner laid down in the notification.

Time for payment of the court-fee three weeks.

V.P.S.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT : SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Gudapati Gopalaswamy .. *Petitioner**

*v.*

Punukollu Ramayya .. *Respondent.*

*Guardians and Wards Act (VIII of 1890), section 34* (d)—*Court has no power in summary proceedings to order the guardian to deposit in Court sums found due by him except to the extent admitted in the accounts filed by him—Section 34-A inserted by the Amending Act of 1929 does not confer such power to order deposit—Desirability of providing for such power by Legislature pointed out.*

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1. (1927) 53 M.L.J. 637 : I.L.R. 50 Mad. 857 (F.B.).
2. (1874) 7 M.H.C.R. 356.
3. (1907) 3 I.C. 484.

* C. R. P. No. 351 of 1943. 24th February, 1944.

Section 34 (*d*) of the Guardian and Wards Act does not empower the Court to direct the guardian to pay into Court more than the amount shown to be due in the accounts filed by him. The insertion of section 34-A by the Amending Act of 1929 does not contemplate anything more than an audit and the Court is given no other powers beyond those which it possessed before the section was inserted in the enactment.

*Harikrishna Chettiar* v. *Govindarajulu Naicker*, (1925) 50 M.L.J. 273, followed ; *Subbarami Reddi* v. *Pattabhirami Reddi*, (1926) 51 M.L.J. 249 : I.L.R. 50 Mad. 80; *Ramachandran* v. *Balasubramania Aiyar*, (1938) 1 M.L.J. 285 : I.L.R. (1938) Mad. 667 and *Misra Rangnath* v. *Misra Murari Lal*, (1935) I.L.R. 58 All. 721, relied on ; *Rama Rao* v. *Rangaswami Rao*, A.I.R. 1926 Mad. 419, dissented from.

Sections 35 and 36 of the Act provide the procedure (namely, by way of a suit against the guardian by the quondam ward) for recovering what he owes to the estate and an order for payment or deposit in Court of any amount other than that shown to be due in the accounts filed by the guardian can only be passed in a regular suit.

It would be far better to have such matters determined in proceedings under the Act, in which case provision would have to be made for an appeal. That however is a question for the Legislature to decide.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of Kistna at Masulipatam dated 18th November, 1942, and made in C. M. P. No. 914 of 1940 in O. P. No. 97 of 1939.

*B. Manavala Chowdri* for Petitioner.

*B. V. Ramanarasu* for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—The short question in this petition is whether the insertion of section 34-A in the Guardians and Wards Act, 1890, by the amending Act of 1929 compels the Court to place a different interpretation upon section 34 (*d*) from that placed upon it by this Court in *Harikrishna Chettiar* v. *Govindarajulu Naicker*[1].

On the 20th December, 1939, the petitioner was appointed the guardian of the property of the two minor sons of one Kotayya. He was directed to submit his accounts once a year. The respondent entered into a surety bond for the due administration of the estate during the minority of the wards. On the 19th September, 1940, the respondent filed a petition in the guardianship proceedings asking for an order of the Court directing the petitioner to file his accounts and the relevant vouchers. On the 15th January, 1941, the petitioner filed a statement of accounts in which he showed that he had collected Rs. 3,864 and had disbursed Rs. 3,822-13-3, leaving a balance in his hands of Rs. 41-2-9. The District Judge sent the accounts for audit under section 34-A. Three reports were presented by the auditor and in the final one he stated that the estate had been wrongly debited with the following sums : Rs. 265 ; Rs. 319-8-6 and Rs. 225. The first of these amounts had been taken by the petitioner himself by way of reimbursement of advances alleged to have been made by him on account of the expenses in the guardianship proceedings. The petitioner said that the Rs. 319-8-6 represented a repayment to his mother of moneys advanced by her to him as the guardian and that the Rs. 225 represented the discharge of a debt due by the estate to his mother. In the opinion of the auditor all these payments were fictitious. The predecessor of the District Judge who passed the order which is challenged in this petition examined the petitioner and recorded a statement. On that examination the present District Judge held that the auditor was justified in disallowing the three sums of Rs. 265 ; Rs. 319-8-6 and Rs. 225. Consequently he ordered the petitioner to pay the aggregate amount into Court. The petitioner challenges the correctness of this order. It is not an order appealable under section 47, but an application for revision lies under section 115 of the Code of Civil Procedure if it was passed without jurisdiction.

Section 34 (*c*) states that the guardian of the property of a ward shall, if required by the Court, exhibit his accounts in the Court at such times and in such form as the Court from time to time directs. Clause (*d*) says that, if so required, the guardian shall pay into the Court the balance due from him on those accounts, or so much thereof as the Court directs. Section 34-A states that when accounts are exhibited by a guardian of the property of a ward in pursuance of a requisition

1. (1925) 50 M.L.J. 273.

made under clause (*c*) of section 34 or otherwise the Court may appoint a person to audit the accounts. The section does not contemplate anything more than an audit and the Court is given no other powers beyond those which it possessed before the section was inserted in the enactment.

In *Harikrishna Chettiar* v. *Govindarajulu Naicker*[1], a Bench of this Court (Venkatasubba Rao and Madhavan Nair, JJ.) held that section 34 (*d*) did not empower the Court to direct the guardian to pay into the Court more than the amount shown to be due in the accounts filed by him. The words " on those accounts " were of importance. If the intention of the Legislature had been that the Court should have power under that section to compel the guardian to pay the amount actually found due the clause would have been worded differently. We are in respectful agreement. Moreover, sections 35 and 36 contemplate a suit being filed against a guardian who has not fulfilled his duty and is required to make restitution to the estate. Section 35 deals with a case where an administration bond has been taken and section 36 a case where there is no administration bond.

In *Subbarami Reddi* v. *Pattabhirami Reddi*[2], Phillips and Madhavan Nair, JJ., held that where a guardian had filed his accounts and had been discharged the Court could not hold an enquiry under the Act into the correctness of the accounts and determine the amount in respect of which the guardian was actually accountable. The scheme of the Act was to relegate to a suit any dispute between the minor and the guardian. This opinion was accepted by a Full Bench of this Court in *Ramachandran* v. *Balasubramania Aiyar*[3]. The Full Bench held that the proper course for the Court to adopt on a minor coming of age was to refuse to grant the guardian a discharge if it appeared that there was a sufficient reason to keep open the question of his liability and in that case to assign to the *quondam* minor the security bond. On the other hand, if the Court considered that the guardian had acted properly and was of opinion that no reasonable claim could be brought against him, the Court should exercise the power which it had of discharging the guardian.

It is said on behalf of the respondent that *Subbarami Reddi* v. *Pattabhirami Reddi*[2] and *Ramachandran* v. *Balasubramania Aiyar*[3] are not in point because in each of these cases the Court was considering the position of a guardian who had been discharged. We do not agree. In our opinion there is no difference in principle. Section 41 (3) states that when the powers of a guardian cease, the Court may require him or, if he is dead, his representative to deliver as it directs any property in his possession or control belonging to the ward or any accounts in his possession or control relating to past or present property of the ward.

In *Ramarao* v. *Rangaswami Rao*[4], Waller, J., said that he could not concede that the Court was bound to accept without scrutiny any account which the guardian chose to submit or to allow him to deliver only such property as he admitted himself to possess. In referring the present case to a Bench Byers, J., has indicated his concurrence in this opinion. If by this is meant that the Court can in summary proceedings pass an order requiring a guardian to deliver up property which he denies possession of we find ourselves unable to share the opinion. In any event it must be rejected in view of the decisions in *Harikrishna Chettiar* v. *Govindarajulu Naicker*[1] and *Subbarami Reddi* v. *Pattabhirami Reddi*[2] and *Ramachandran* v. *Balasubramania Aiyar.*[3]

Our attention has also been drawn to the fact that the Allahabad High Court in *Sitaram* v. *Mst. Govindi*[5] expressed an opinion similar to that expressed by Waller, J. The judgment of the Allahabad High Court does not carry the matter any further and it is to be observed that in *Misra Rangnath* v. *Misra Murari Lal*[6], another Bench of that Court dissented from the opinion expressed in *Sitaram* v. *Mst. Govindi*[5]. The later opinion was formed after section 34-A had been inserted in the statute.

1. (1925) 50 M.L.J. 273.
2. (1926) 51 M.L.J. 249 : I.L.R. 50 Mad. 80.
3. (1938) 1 M.L.J. 285 ; I.L.R. (1938) Mad. 667.
4. A.I.R. 1926 Mad. 419.
5. (1924) I.L.R. 46 All. 458.
6. (1935) I.L.R. 58 All. 721.

We can see no justification for the suggestion that the insertion of section 34-A has altered the position. The auditor has no power to decide questions of liability or whether a guardian has or has not made advances to the estate. The auditor's duty is to audit the accounts and to prepare a balance sheet on a proper basis. It will, of course, be within his duty to draw attention to suspicious features and to disputes, but that is quite a different matter from saying that he has the power of deciding whether the guardian has or has not made a particular payment in excess of his powers or in fraud of the estate when such matters are in dispute, which is the case here. If, on a balance sheet correctly drawn, it is obvious that the guardian has in his hands more than what he has himself showed, the Court has no doubt power to order the guardian to pay into the Court the correct amount, but the balance sheet must be drawn upon the accounts submitted by the guardian.

As we have indicated, sections 35 and 36 provide the procedure for recovering from the guardian what he owes to the estate, and in our judgment an order of the nature of the one under discussion can only be passed in a regular suit. Whether a suit is the best mode of procedure is another matter. We consider that it would be far better to have such matters as the present one determined in proceedings under the Act, in which case provision would, of course, have to be made for an appeal. This is however a question for the Legislature to decide. We can have regard only to the Act as it now stands and in the circumstances the petition must be allowed with costs here and below.

K.S. ——— *Petition allowed.*

## [PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad).

PRESENT :—LORD ATKIN, LORD PORTER AND SIR GEORGE RANKIN.

Lachhmi Sewak Sahu .. *Appellant**

*v.*

Ram Rup Sahu (deceased) and others .. *Respondents.*

*Hindu Law—Religious endowment—Waqf—Deed by a Hindu governed by Mitakshara providing for property being in charge of himself and his heirs from generation to generation—Mode of devolution on successors in right of management—Management by senior member—Adverse possession as against others—Ouster —Necessity —Practice—New plea of limitation—Can be raised even in Court of last resort.*

A deed of waqf executed by a member of a joint Hindu family governed by the Mitakshara provided that "the profits of the endowed property shall after the payment of the Government revenue, be in charge of me, the executant and my heirs generation after generation." In a suit for partition by a member of the joint Hindu family after the settlor's death, in regard to the waqf property, *Held*, that after the settlor's death his successors in the right of management would not take as members of a Mitakshara joint family, but simply as his heirs might take his separate property as a matter of inheritance. In the light of this distinction the possession of the senior member of the family of the property cannot be adverse as against the others. The case is really on the same footing as that common in Bengal of the sebaiti of the family idol descending by inheritance in like manner as secular property under the Dayabhaga. Under that law debutter property and secular property could hardly be treated differently ; in the latter case it is clear that until something is done which amounts to an ouster of one of the heirs, the possession of one is considered to be the possession of all. That the representative of the eldest branch should in fact be allowed to see to the *debsheba*, to collect the income and to defray the proper expenses is very far from being cogent proof of ouster.

A point of limitation, though not taken at any stage of the proceedings in the lower Courts, is *prima facie* admissible even in Court of last resort.

*J. M. Parikh* and *V. K. Krishna Menon* for Appellant.

*W. Wallach*, for Respondents.

Their Lordships' judgment was delivered by

SIR GEORGE RANKIN.—This appeal arises out of a partition suit brought on 3rd August, 1928, in the Court of the Subordinate Judge of Azamgarh by one Ram Rup, son of Ram Narain, a Hindu governed by the Mitakshara. Ram Rup, the plaintiff, died in 1936 and is now represented by his son and grandson. At the date of the suit his father and all his brothers were dead and he impleaded as defendants 1 to 6 the sons and widows of his brothers. The widow of one brother who had died in 1915 was not impleaded but need not be further mentioned. The

* P. C. A. No. 10 of 1937. 13th December, 1943.

first defendant is the son of his eldest brother Bhairon and is the appellant before the Board. The plaintiff averred that he and his nephew were members of a joint Hindu family of which Bhairon until his death in 1927, and thereafter the appellant, had been karta. He pleaded that on 4th August, 1927, the various members of the family had by a deed dated 4th August, 1927, agreed to come to a partition and nominated arbitrators for the purpose; and that these arbitrators had carried out this work in part though they had not effected any division of the houses, when on 23rd July, 1928, they withdrew from their task. The plaintiff joined as defendants certain persons who were alleged to be debtors to the joint family upon allegations which it is no longer necessary to consider. He also included a claim to be one of the managers of a private family idol—Sri Thakurji defendant 10—which was possessed of an 8 annas share in a village called Asni.

The present appellant resisted the suit saying that the family had not been joint since 1916, that the deed of 4th August, 1927, which recited that they were joint was fictitious, that the books of account and cash of the family were with the plaintiff, and that the plaintiff was not a "mutawalli" of the endowed property in Asni.

Both Courts in India have disbelieved the appellant, have rejected his case and have found in favour of the plaintiff. They have held the deed of 4th August, 1927, to be genuine, that the family was at that date joint, that the arbitrators' partition so far as it went was fair and reasonable, and that the appellant is liable to render accounts. They have directed a partition of the houses into five shares—one going to Mst. Manaki, the sonless widow of the plaintiff's brother Bindeshri, as provided in the deed of 4th August, 1927.

Upon all these matters Mr. Parikh, learned counsel for the appellant, concedes that he cannot press this appeal and their Lordships are only concerned with them so far as to express their opinion that in view of the concurrent findings learned counsel has exercised his discretion very properly.

Upon one point however this appeal has been urged. It is not a point taken at any stage of the proceedings in either of the Indian Courts, but, as it is a point of limitation, it is *prima facie* admissible even in a Court of last resort. It has reference to the claim of the plaintiff to be a "mutawalli" of the property dedicated to Sri Thakurji, and it is founded upon the fact that in the revenue papers the property was recorded as belonging to Sri Thakurji "under the supervision of Bhairon." On this it is now contended that the plaintiff had been out of possession for a time sufficient to bar him from recovering in this suit of 1928 possession of his share in the office of "mutawalli" or of his share in the endowed property. On either of these views as to the nature of his claim he would be barred by twelve years adverse possession under article 124 or article 144 of the schedule to the Limitation Act, 1908 (*Gnanasambanda's case*[1]).

This part of the plaintiff's claim was put forward in the plaint on the footing that the plaintiff was in possession to the extent of his right—that is, of a one-fifth share; and that he desired a declaration to that effect. The learned Subordinate Judge thought that the proper form of declaration was "that the plaintiff along with others is a 'mutawalli' of Sri Thakurji." The High Court judgment states:

> "It is objected on behalf of defendant No. 1 that since the plaintiff is admittedly out of possession of this property he should have added a prayer in his plaint for consequential relief. It is a fact that the plaintiff is not in possession, but since this is a partition suit and all the parties are before the Court, we are of opinion that under the provisions of Order 41, rule 33, Civil Procedure Code, this Court can and should give to the plaintiff the supplementary relief of possession, this being the only method by which the partition can be given effect to in respect to the endowed property."

By their decree of 23rd August, 1934, they modified the trial Court's decree by a direction "that the plaintiff shall be given a decree for joint possession of the endowed property." No suggestion of any difficulty as to limitation appears from

1. (1899) 10 M.L.J. 29; L.R. 27 I.A. 69, 77: I.L.R. 23 Mad. 271 (P.C.).

the High Court's judgment; the argument about "consequential relief" being an objection taken on the terms of section 42 of the Specific Relief Act to the grant of a mere declaration.

Neither by his petition of appeal nor by the case lodged on his behalf has the appellant suggested any difficulty on the score of limitation, but in argument his learned counsel drew the attention of the Board to the terms of the endowment. These are to be found in Exhibit 3 a deed (waqfnama) dated 28th July, 1875, made by Ram Narain, the plaintiff's father. By this deed he made a "waqf" of the 8 annas share of mauza Asni for meeting the necessary expenses of a "thakurdwara" situate in mauza Ghauspur which had been constructed by himself. The deed provided :

> "The profits of the endowed property shall after the payment of the Government revenue, be in the charge of me, the executant and my heirs generation after generation."

On this provision learned counsel for the appellant very correctly points out that after the settlor's death his successors in the right of management would not take as members of a Mitakshara joint family but simply as his heirs might take his separate property as a matter of inheritance.

When full weight is given to this distinction it does not appear to their Lordships to make it possible on this appeal that they should come to a finding that the possession of the plaintiff's eldest brother Bhairon before 1927 had been adverse to the plaintiff. The case is really on the same footing as that common in Bengal of the *sebaiti* of the family idol descending by inheritance in like manner as secular property under the Dayabhaga. Under that law, debutter property and secular property could hardly be treated differently : in the latter case it is clear that until something is done which amounts to an ouster of one of the heirs the possession of one is considered to be the possession of all. That the representative of the eldest branch should in fact be allowed to see to the *debsheba*, to collect the income and to defray the proper expenses is very far from being cogent proof of ouster. Let it be assumed however that there is some room for doubt as to the limits of the rule as to possession between co-owners. The question whether Bhairon's possession was adverse to the plaintiff is still a question of fact ; and it would be manifestly unjust if it were held, in the absence of any issue, any cross-examination, any inquiry upon the point, and without giving the plaintiff an opportunity to meet the allegation, that the possession of Bhairon and of the appellant had been adverse to the plaintiff for twelve years. Their Lordships are not here concerned to forecast the result at which a proper inquiry would arrive, but there are important materials to be considered as tending to show that Bhairon's possession of the office of manager of this endowment was not adverse to the plaintiff. The mere facts that the idol was a private family idol, and that this Mitakshara family remained joint, as has now been held, till 1927, the year before suit, make it readily intelligible that the eldest brother who managed the family properties should manage the family idol's affairs. When to this it is added, as the appellant's own evidence would warrant, that Bhairon lived to be a very old man "engrossed always in his puja" the inference of adverse possession becomes still less plain. The High Court may well have been right in thinking that at the date of the suit or of the hearing the plaintiff was not in possession of any share in the office of manager ; the plaint had stated that "the defendants 1 to 4 deny the plaintiff's rights as mutawalli." But there is nothing in this to suggest that they had denied it twelve years before and ever since, and their Lordships cannot now be asked to hold that the possession of the appellant's father was adverse to the plaintiff.

They will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of Ram Rup's legal representatives.

Solicitors for Appellant : *Harold Shepherd.*

Solicitors for Respondents : *Hy. S. L. Polak and Co.*

V.S. ——— *Appeal dismissed.*

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI.

S. Avudayammal (deceased) and others .. *Appellants**

*v.*

Ambasankar Davay and others .. *Respondents.*

*Limitation Act (IX of 1908), section 20—Open payment—Payment towards principal and interest—Absence of appropriation by creditor—Saving of limitation—Amending section—Whether takes retrospective effect.*

A payment made merely towards principal and interest without the debtor specifying what part of it was to go towards principal and what part towards interest is no more than a payment generally on account of the debt or an open payment and cannot be regarded as a payment towards interest as such within the meaning of section 20 of the Limitation Act. The mere fact that the payment is said to have been made towards principal and interest when both are due and the sum paid does not exceed the one or the other cannot involve the implication that any part of the payment was intended by the debtor to go towards " interest". Nor can such payment be said to be made towards principal where there is no appropriation by the debtor of the payment towards principal.

*Rama Shah* v. *Lal Chand,* (1940) 1 M.L.J. 895 : L.R. 67 I.A. 160 : I.L.R. (1940) Lah. 470 (P.C.) and *Het Ram Bodh Raj* v. *Aya Ram Tola Ram,* (1937) 42 C.W.N. 509 (P.C.), considered.

Where the debt had become barred by limitation long before the amendment of section 20 of the Limitation Act took effect the amendment could not be relied on to operate retrospectively so as to revive the barred debt.

*Krishnaswami Naicker* v. *Thiruvengada Mudaliar,* (1934) 68 M.L.J. 63, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in A. S. No. 10 of 1942, preferred against the decree of the Court of the District Munsiff of Tenkasi in O. S. No. 189 of 1940.

*K. R. Rangaswami Ayyangar* for Appellants.

*A. V. Viswanatha Sastri* and *V. Seshadri* for Respondents.

The Court delivered the following

JUDGMENT.—The appellants in this second appeal were defendants 10 and 11 in a suit brought by the first respondent to enforce a mortgage. The mortgage was executed by defendants 1 to 3 on 25th June, 1915, but the mortgage money became due on 23rd June, 1916. The appellants purchased some of the items comprised in the mortgage on 17th January, 1923. The first respondent obtained an assignment of the mortgage from the original mortgagee, the 12th defendant, and brought the suit on 24th June, 1940. The first Court dismissed the suit as against the appellants holding that the claim on the mortgage against the items purchased by them was time barred. On appeal by the first respondent the lower appellate Court passed a decree even as against them, and hence this second appeal.

The only questions argued in the second appeal related to the plea of limitation raised by the appellants. In answer to that plea the first respondent relied on a payment of Rs. 10 made on 26th June, 1928, on behalf of the mortgagors and endorsed by them on the bond. This sum was less than the principal or interest due on that date. The endorsement runs as follows :

" Paid Rs. 10 this day towards the principal and interest accrued due under this deed through Sankaranayakar on behalf of Shanmugham Pillai Vagaira in the presence of Shanmugham Pillai."

and is signed by defendants 1 to 3 the mortgagors. The Court below took the view that on the language of this endorsement, the amount must be taken to have been paid partly towards principal and partly towards interest, and that as the payment towards the principal satisfies the requirements of section 20 (1) of the Limitation Act, the suit was in time against all the defendants.

Mr. Rangaswami Ayyangar, the learned counsel for the appellants, contests this view pointing out that the first respondent himself alleged in his plaint that the payment was made towards interest due under the bond, and that it could not

* S. A. No. 1507 of 1942. 16th February, 1944.

be regarded as a part payment of principal in the absence of any appropriation proved to have been made by the mortgagee before the expiry of the period of limitation. His contention was that a payment in such terms could only be regarded as a payment on general account, which, according to the decision of the Privy Council in *Rama Shah* v. *Lal Chand*[1] was by itself ineffectual to save limitation. This decision clearly lays down that a payment made towards a debt cannot be regarded as a payment towards the principal of the debt for purposes of limitation unless such payment was appropriated by the creditor within the period of limitation so as to make it a part payment of principal. Their Lordships definitely indicated their view that the decisions of the Courts in India holding that a payment on general account must necessarily have been made either towards interest or towards principal and in either case would save limitation provided the other requirements of section 20 were satisfied did not correctly lay down the law. Here, no appropriation of the payment or any part of it to principal was put forward or proved and in fact the plaint, as already observed, alleged that the payment was made towards interest. In such circumstances, it is difficult to uphold the conclusion of the lower Court that the payment in question was a part payment of principal for purposes of the Limitation Act. Indeed, Mr. Viswanatha Sastri for the respondents did not attempt to support this view. He urged, however, that the payment having been made in express terms towards "the principal and the interest accrued due under the bond", it should be regarded as payment of *interest as such* within the meaning of section 20. Apart from the terms of the endorsement Mr. Viswanatha Sastri did not rely upon any other evidence tending to show that the debtor paid the amount specifically towards the interest. That no doubt was the allegation in the plaint, but there is no evidence in support of it. The question therefore has to be decided solely with reference to the language of the endorsement. Notwithstanding the existence of some authority in support of the contention of Mr. Viswanatha Sastri, it seems to me that a payment made merely towards principal and interest without the debtor specifying what part of it was to go towards principal and what part towards interest is no more than a payment generally on account of the debt or an " open payment " as it is called by their Lordships, and cannot be regarded as a payment towards interest as such within the meaning of the section. Any payment made on account of a debt must be a payment made towards the principal and accrued interest, unless the whole of principal or the whole of interest has already been paid, in which case no difficulty can arise as the payment must be taken to have been made towards interest or principal as the case may be. The mere fact, therefore, that the payment is said to have been made towards principal and interest where both are due and the sum paid does not exceed the one or the other, cannot involve the implication that any part of the payment was intended by the debtor to go towards interest. Payment of interest as such by the debtor clearly implies a payment made either with express intimation or under circumstances indicating that the payment is to be applied in reduction of the interest or in other words, it implies an appropriation of the payment to interest by the debtor himself and excludes the creditor's right of appropriation. Can it be said in this case that the mortgagee was bound to apply any part of the sum of Rs. 10 towards interest? I think not, as no part was specified by the mortgagors as applicable in reduction of interest. He could have appropriated the whole of it to principal. In such circumstances, the payment must be regarded as an open payment notwithstanding that it was in terms made towards principal and interest as evidenced by the endorsement and it cannot operate to save the bar of limitation.

Mr. Viswanatha Sastri relied in support of his contention on the decision of their Lordships of the Judicial Committee in *Het Ram Bodh Raj* v. *Aya Ram Tola Ram*[2]. That was a case where a debt had to be paid in certain instalments, the first of which, namely, Rs. 13,000 had to be paid with a year's interest to that date on 27th January, 1929. After various payments had been made, the debtor sent a sum of Rs. 825

1. (1940) 1 M.L.J. 895 : L.R. 67 I.A. 160 : I.L.R. (1940) Lah. 470 (P.C.).

2. (1937) 42 C.W.N. 509 (P.C.).

on 15th February, 1929, with an intimation that the creditor should " deduct from this the amount that is due to you for my first instalment according to accounts and keep the rest in my name . . . . Send me a formal receipt of the amount of the first instalment together with interest." This clearly showed that the payment made was in excess of what was due in respect of the first instalment including interest, and this necessarily implied that a part of the sum was paid for interest as such. It was with reference to a payment made in such circumstances that their Lordships said : "The payment was made and was necessarily made in respect of principal and interest. It was therefore a payment of interest on a debt as such by the person liable to pay the debt." This passage on which Mr. Viswanatha Sastri placed strong reliance must be understood with reference to the facts stated above which clearly implied payment of interest as such. It would be misleading if it were taken out of its context and read as applicable to all payments made " in respect of principal and interest " as Mr. Viswanatha Sastri attempted to do. The other decisions cited by Mr. Viswanatha Sastri, namely, *Subraya Kamati* v. *Pakaya*[1] *Mohan Shaha* v. *Lakshmi Karikar*[2] and *Ramakrishna Annavi* v. *Pichandi Chettiar*[3], do, however, support his contention. In *Subraya Kamati* v. *Pakaya*[1], Jenkins, C.J., held that a payment of " Rs. 4 out of the entire amount payable on account of principal and interest due under this bond " was a payment of interest as such by the person liable so as to attract the provisions of section 20. This decision was followed by the Calcutta High Court in *Mohan Shaha* v. *Lakshmi Karikar*[2] and by Phillips, J., of this Court in *Ramakrishna Annavi* v. *Pichandi Chettiar*[3]. These cases, however, were all decided before the exposition of the true meaning and effect of section 20 of the Limitation Act by their Lordships of the Judicial Comm·ttee in *Rama Shah's case*[4]. No decision on the point after *Rama Shah's case*[4] was brought to my notice except *Ramswarup Prasad Singh* v. *Harihar Prasad Singh*[5], where Dhavle, J., in deciding the case on another point, made the following observations after referring to the earlier decisions,

> " The difference between what is called a general or an open payment and a payment towards principal, interest and costs, such as we have in the present case, is no doubt rather fine, but lies in the fact that unlike the former the latter negatives the last of the four possibilities (regarding the ntention of the debtor who makes the payment) pointed out by Sir George Rankin in *Rama Shah's case*[4], namely, the possibility (common enough in the former) that there was no intention of appropriation as between interest and principal. The mortgagor in the present case appears clearly to have contemplated payment not merely on account of principal with or without costs but also on account of interest, though he left the exact appropriation to the decree-holder."

With all respect, it does not seem correct to say that a payment towards principal and interest negatives the possibility that there was no intention of appropriation as between interest and principal. So long as the debtor has not specified what part of the sum paid should be applied in reduction of the interest, he cannot be said to have appropriated any part of it towards interest. If he left the " exact appropriation " to the creditor, the latter must be within his rights if he appropriated the whole of the payment towards the principal, and this could only be on the footing of an open payment. In my opinion a payment towards principal and interest of a sum which is not in excess of the principal or the interest then due can no more be regarded as appropriated to interest by the debtor than a payment towards the debt.

Another point raised by Mr. Viswanatha Sastri can be disposed of in a few words. He contended that the Indian Limitation (Amendment) Act, 1942, was applicable here and that the payment in question was sufficient, under section 20, as amended, to save limitation. The amendment was intended to supersede the law as expounded in *Rama Shah's case*[4], and to make a payment " on account of a debt " sufficient for the purposes of the section. But it is to be observed that if under the old section, the payment was ineffectual to extend the time as I have held it to be, the debt in suit became unenforceable long before the amending Act came

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1. (1902) 4 Bom.L.R. 231.
2. (1910) 6 I.C. 16.
3. (1923) 74 I.C. 777.
4. (1940) 1 M.L.J. 895 : L.R. 67 I.A. 160 : I.L.R. (1940) Lah. 470 (P.C.).
5. I.L.R. (1942) Pat. 330.

into force, and the amendment cannot operate retrospectively so as to revive barred debts. (See *Krishnaswami Naicker* v. *Thiruvengada Mudaliar*[1].) There is nothing in *Babu Durga Prasad* v. *Krishuri*[2], cited for the respondent to support his contention. All that the Court there decided was that the amendment in question could not be taken advantage of by an applicant for revision although an appellant might be entitled to the benefit of a change of law made during the pendency of an appeal. As the learned Judges were dealing with a revision petition it was not necessary for them to decide and they did not decide, whether the new section 20 had the effect of reviving barred debts.

In the result, the appeal is allowed and the first respondent's suit is dismissed with costs in this and the lower appellate Court so far as the appellants are concerned.

Leave refused.

B.V.V. *Appeal allowed.*

## [THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Madras.)*

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

R. Subbaroyan and others .. *Appellants*†

*v.*

The King-Emperor .. *Respondent.*

*Special Criminal Courts (Repeal) Ordinance (XIX of 1943), section 4—Applicability—Review under section 8* (a) *of Ordinance II of 1942 not completed prior to the coming into force of Ordinance XIX of 1943—Appeals preferred to High Court in the meanwhile—Acquittal of accused whose sentence necessitated review and dismissal of appeals of others—Appeal to Federal Court—If could be disposed finally by the Federal Court on the merits.*

The proceedings before the Special Judge under Ordinance II of 1942 were, by virtue of the sentence passed on *R*, one of the eight accused tried together, subject to review under section 8 (*a*) of the Ordinance. Before the review was completed Ordinance XIX of 1943 came into force. Meanwhile the convicted persons preferred appeals under section 3 (2) of the latter ordinance to the High Court with the result that *R* was acquitted and the appeals of others were dismissed. On appeal to the Federal Court from the judgment of the High Court it was contended on behalf of the Crown that the cases of the appellants were governed not by section 4 but by section 3 (2) of Ordinance XIX of 1943 and that accordingly the Federal Court could entertain their appeals and dispose of them finally.

*Held*, negativing the contention of the Crown, that the expression ' proceedings ' in section 8 (*a*) of Ordinance II of 1942 comprises the whole proceedings before a Special Judge so that where in any such proceedings any one of the several convicted persons tried together is sentenced to seven years' imprisonment or a severer punishment, a review becomes obligatory under clause (*a*) of the section, not merely in respect of such convicted person, but in respect of the whole case. Hence a case like the present fell within the purview of section 4 of Ordinance XIX of 1943, with the result that the proceedings had before the Special Judge must be treated as void and the case must be deemed to be transferred to the appropriate Court under that section for inquiry and trial in accordance with the provisions of the Criminal Procedure Code.

*Ch. Ramditta Mall* (with *M. S. Venkatarama Ayyar*) instructed by *Naunit Lal*, Agent, for Appellants.

*Sir Alladi Krishnaswami Ayyar*, Advocate-General of Madras (with *N. Rajagopala Ayyangar*) instructed by *Ganpat Rai*, Agent, for Respondent.

*Sir Brojendra Mitter*, Advocate-General of India (with *H. K. Bose*) instructed by *K. Y. Bhandarkar*, Agent, for Governor-General-in-Council.

The Judgment of the Court was delivered by

*The Chief Justice.*—Eight persons, including the four appellants before us, were tried under the provisions of Ordinance No. II of 1942, by the Special Judge for the Presidency town of Madras at Chingleput, on charges of criminal conspiracy to commit various offences and also on charges of substantive offences. The trial resulted in the conviction of the appellants, who were sentenced to rigorous imprison-

1. (1934) 68 M.L.J. 63. 2. (1943) I.L.R. 18 Luck. 241.

* (1944) 1 M.L.J. 91.

† Case No. 57 of 1943. 17th February, 1944.

ment ranging from three to five years and of one Ramaratnam who was sentenced to rigorous imprisonment for seven years. The judgment of the Special Judge was pronounced on 11th May, 1943. The proceedings before the Special Judge were by virtue of the sentence passed on Ramaratnam, subject to review under section 8 (*a*) of the Ordinance. Before the review was completed, Ordinance No. XIX of 1943 came into force. We have held in *Piare Dusadh* v. *King-Emperor* (Case No. XXXV of 1943) that a case like this fell within the purview of section 4 of that Ordinance, with the result that the proceedings had before the Special Judge must be treated as void and the case must be deemed to be transferred to the appropriate Court under that section for inquiry and trial in accordance with the provisions of the Criminal Procedure Code.

What actually happened in this case was that the convicted persons preferred appeals under section 3 (2) of Ordinance No. XIX to the Madras High Court, with the result that Ramaratnam was acquitted and the appeals of the others were dismissed. The High Court granted a certificate under section 205 of the Constitution Act and the case of the appellants is now before us on appeal.

It was urged on behalf of the Crown that section 8 (*a*) of Ordinance No. II of 1942 was applicable only to the case of Ramaratnam, and that the cases of the appellants were governed not by section 4 but by section 3 (2) of Ordinance No. XIX, and that we could accordingly entertain their appeals and dispose of them finally. It was contended that though the proceeding before the Special Judge in respect of all the eight accused persons was a single trial, as soon as the convictions were recorded the proceeding with respect to each of them became in law a separate proceeding for the purposes of section 8 (*a*) of Ordinance No. II, and that a review was obligatory only in respect of the proceeding relating to Ramaratnam; the proceedings relating to the appellants not being subject to review at all. We are unable to accede to this contention. In our judgment, the expression 'proceedings' in section 8 comprises the whole of the proceedings before a Special Judge, so that where in any such proceedings any one of several convicted persons tried together is sentenced to death, or to transportation for life, or to imprisonment for a term of seven years or more, a review becomes obligatory under clause (*a*) of the section, not merely in respect of such convicted person, but in respect of the whole case.

If the contention advanced on behalf of the Crown were to be accepted, the result in this case would be that with regard to Ramaratnam the proceedings had before the Special Judge and the judgment of the High Court on appeal must be treated as void and his case must be deemed to be pending before the appropriate Court under section 4 of Ordinance No. XIX, while the cases of the appellants must be disposed of finally by us. They were all tried together on charges of criminal conspiracy, and one of the contentions raised in the grounds of appeal on behalf of the appellants is that as the result of the acquittal of Ramaratnam by the High Court and the discharge or acquittal of three of the original eight accused by the Special Judge, vital links in the chain of the conspiracy have been knocked out, so that the charge of conspiracy against the appellants must fail on that ground alone. It is obvious that that contention could not be finally disposed of by us so long as the matter of the guilt of Ramaratnam was still the subject of judicial determination. We mention this merely to reinforce our view that 'proceedings' in section 8 of Ordinance No. II must be construed as meaning the whole case and not merely the case or cases of the convict or convicts sentenced to seven years' imprisonment or a severer punishment.

The result is that the appeal is allowed and it is declared that in place of the order of the High Court confirming the convictions, there shall be substituted an order directing further proceedings in the case to be taken in accordance with the provisions of section 4 of Ordinance No. XIX of 1943.

V. S. *Appeal allowed.*

## [THE FEDERAL COURT OF INDIA.]

(On appeal from the Chief Court of Sind.)

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

Devkishindas .. *Appellant**

*v.*

The King-Emperor .. *Respondent.*

*Special Criminal Courts (Repeal) Ordinance (XIX of 1943), section 4—Applicability—Non-completion of review under section 8 (a) of Ordinance II of 1942 prior to Ordinance XIX of 1943 coming into force—Appeals to High Court filed in the meanwhile, dismissed—Appeal to Federal Court—If could be disposed of on merits.*

Before a review under section 8 (*a*) of Ordinance II of 1942 was completed Ordinance XIX of 1943 had come into force. The appeals filed by the convicted persons under section 3 (2) of Ordinance XIX of 1943 in the meanwhile, were dismissed. On appeal to the Federal Court by one of the convicted persons,

*Held*, following *Subbaroyan* v. *King-Emperor*, (1944) F.L.J. 102, that the proceedings had before the Special Judge must be treated as void and the case must be deemed to be transferred to the appropriate Court under section 4 of the Ordinance XIX of 1943, for inquiry and trial in accordance with the provisions of the Criminal Procedure Code.

*Ch. Ramditta Mall* (with *Manghanmal Bhojraj*) instructed by *Naunit Lal*, Agent, for Appellant.

*Hassanally Agha*, Advocate-General of Sind (with *D.J. Lalvani* and *Raghbir Singh*) instructed by *Ganpat Rai*, Agent, for Respondent.

*Sir Brojendra Mitter*, Advocate-General of India (with *H. K. Bose*) instructed by *K. Y. Bhandarkar*, Agent, for the Governor-General-in-Council.

The Judgment of the Court was delivered by

*The Chief Justice.*—The appellant and five others were convicted at a trial held under the provisions of Ordinance No. II of 1942, by the Special Judge, Karachi, on charges of criminal conspiracy to commit various offences ; three of them, not including the appellant, being also convicted on charges of substantive offences, and were sentenced to five years' rigorous imprisonment each in the case of the appellant and two others, and to nine years' rigorous imprisonment each in the case of the remaining three. The judgment of the Special Judge was pronounced on the 27th May, 1943, and he submitted the case for review under section 8 of the Ordinance on the 29th May, 1943. Ordinance No. XIX of 1943 was promulgated before the review could be completed. The convicts preferred appeals under section 3 (2) of that Ordinance to the Chief Court of Sind. The appeals were dismissed on the 9th September, 1943. The appellant alone has come up to us on appeal on a certificate under section 205 of the Constitution Act granted by the Chief Court. This case is similar to *R. Subbaroyan* v. *King-Emperor*[1], in which we have just delivered judgment. Following our decision in that case, the proceedings had in this case before the Special Judge, Karachi, must be treated as void and the case must be deemed to be transferred to the appropriate Court under section 4 of Ordinance No. XIX of 1943, for inquiry and trial in accordance with the provisions of the Criminal Procedure Code.

The appeal is allowed and it is declared that in place of the order of the Chief Court confirming the conviction there shall be substituted an order directing further proceedings to be taken in accordance with the provisions of section 4 of Ordinance No. XIX of 1943.

V. S. — *Appeal allowed.*

* Case No. 59 of 1943. 17th February, 1944.

1. (1944) F.L.J. 102.

## [THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

Rajagopalan and another .. *Appellants**

*v.*

The King-Emperor .. *Respondent.*

*Indian Penal Code (XLV of 1860), sections 302, 149 and 34—Conviction under section 302 read with section 149—Sentence—Transportation if the appropriate sentence.*

Per *Zafrulla Khan, J.* (*Spens, C.J.*, concurring).—The contention that in case of a conviction under section 302 of the Indian Penal Code read with section 149, the appropriate sentence in all cases must be transportation for life cannot be acceded to. The question of sentence must in each case depend upon the facts of the case. If there is a finding that the concerned accused, though they were among the rioters some of whom in pursuance of the common object of the unlawful assembly as at that stage constituted, committed the murder, had themselves taken no part in the assault upon the deceased, there might be some force in the suggestion that the lesser sentence would meet the ends of justice in their case. Where there is no such finding but on the contrary it is found that the concerned accused were among those who inflicted the injuries received by the deceased, the sentence of death cannot be said to be inappropriate.

Per *Varadachariar, J.*—The Court would not be justified in such a case in affirming the sentence of death independently of the question whether the case fell within section 34 or only under section 149 of the Indian Penal Code. Unless a Court is able to draw an inference from the evidence that the accused must have taken part in the acts which resulted in the death of the deceased, it will be difficult to bring the case within section 34 of the Indian Penal Code.

*Ch. Ramditta Mall* (with *M. C. Sridharan*) instructed by *Naunit Lal*, Agent, for Appellants.

*Sir Alladi Krishnaswami Ayyar*, Advocate-General of Madras (with *N. Rajagopala Ayyangar*) instructed by *Ganpat Rai*, Agent, for Respondent.

*Sir Brojendra Mitter*, Advocate-General of India (with *H. K. Bose*) instructed by *K. Y. Bhandarkar*, Agent, for Governor-General-in-Council.

The Court delivered the following

JUDGMENTS: *Zafrulla Khan, J.* (*Spens, C.J.*, concurring).—During the early hours of the morning of the 20th of September, 1942, a large number of persons stated to be between sixty and seventy, including the two appellants here, armed with deadly weapons, marched to the salt factory at Kulasekharapatnam, inflicted injuries upon the guards and peons, secured their persons, stole a couple of guns and set fire to one of the sheds. Thereafter most of them departed. At that stage an Assistant Inspector in charge of the factory appeared on the scene with a rifle to which a bayonet had been attached. He had apparently no cartridges with him, but proceeded to chase away such of the rioters as were still within the compound of the factory with the help of the bayonet, inflicting one or two injuries which were not of a serious character. While he was thus engaged, a score or so of the rioters who had gone out of the compound rushed back into the compound, and seven or eight of them, including the appellants, set upon him with their weapons and inflicted altogether sixteen injuries upon his person, several of them serious, as the result of which he died on the spot.

Twenty-two of the rioters were put up before the Special Judge of Tinnevelly for trial under the provisions of Ordinance No. II of 1942, on charges of rioting, causing mischief by fire, dacoity and murder. Several of them were convicted of various offences, the appellants being convicted, among other offences, of murder. They were sentenced in respect of that charge to death. Their appeal to the Madras High Court was dismissed, and they have come up to us on appeal on a certificate under section 205 of the Constitution Act.

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* Case No. 60 of 1943. 17th February, 1944.

The constitutional questions raised in the case are concluded by our judgment in *Piare Dusadh* v. *King-Emperor*[1].

On the merits, counsel for the appellants confined his submission to the question of sentence. It was contended that the appellants could be held guilty of murder only by virtue of the provisions of section 149 of the Indian Penal Code, and that in a case like that a sentence of transportation for life was more appropriate than the sentence of death. On behalf of the Crown it was urged that the case of the appellants fell within the purview of section 34 of the Indian Penal Code. In the view that we take, it is unnecessary to decide whether section 34 would or would not apply to the facts as found by the High Court. We are unable to accede to the contention that in case of a conviction under section 302 of the Penal Code read with section 149, the appropriate sentence in all cases must be transportation for life. The question of sentence must in each case depend upon the facts of the case. Had there been a finding that the appellants, though they were among the rioters some of whom in pursuance of the common object of the unlawful assembly as at that stage constituted, caused the death of the Assistant Inspector, had themselves taken no part in the assault upon the deceased, there might have been some force in the suggestion that the lesser sentence would meet the ends of justice in their case. There is no such finding in this case. On the contrary, the finding is that the appellants were among the seven or eight persons who inflicted the large number of injuries which the deceased received, though the High Court did not go so far as to accept that part of the evidence which indicated the nature of the injuries that the appellants had actually inflicted. Having regard to all the circumstances of the case as disclosed in the evidence, we are not disposed to hold in the case of either of the appellants that the sentence of death is inappropriate.

It was suggested with regard to the first appellant that there was doubt whether he had actually inflicted any injury upon the deceased at all, inasmuch as the evidence on this part of the case is that he cut and stabbed the deceased (one witness stating that he did so with an *aruval*), whereas he was alleged to have been armed with a gun. The evidence however discloses no such conflict. The first appellant is alleged to have been armed with a gun during a meeting that was held under his presidentship at some distance from the salt factory, in which it was decided to march to the factory and to commit the riot. The assault upon the deceased took place towards the close of the incidents of that morning, and it might well be that during the interval the first appellant had exchanged the gun for an *aruval* or other cutting instrument. No attempt was made during the course of the cross-examination to discredit that part of the testimony of the witnesses who stated that the first appellant had cut and stabbed the deceased. The witnesses were on this point unanimous.

The appellants were in our opinion rightly convicted of the offence of murder and the death sentence is appropriate. As no other point was sought to be raised before us, the appeal is dismissed.

*Varadachariar, J.*—I feel some difficulty in sustaining the sentence of death imposed on the first accused. His counsel did not challenge the finding that the two appellants were "amongst those who actually chased Mr. Loane when he was bayoneting the rioters inside the compound of the factory". The word "chased" is perhaps apt to mislead. All that the evidence shows is that these persons ran from several directions towards the spot where the Assistant Inspector was chasing and bayoneting some of their comrades. The question then is, under what provision of law is the first accused to be convicted with reference to the murder of Mr. Loane.

The Special Judge had no difficulty in convicting him under section 302 of the Indian Penal Code, because he accepted the evidence of P. Ws. 1, 2, 4 and 5 who deposed that the first accused was one of those who cut and stabbed the deceased. P. W. 5 specifically stated that the first accused cut the deceased with an *aruval*

1. (1944) 1 M.L.J. 305 : 6 F.L.J. 187.

(a big curved knife). This evidence was criticised before the High Court with some force, on behalf of the appellants. It was pointed out that these witnesses who had themselves been injured and had been tied up with ropes and left to roll on the ground at a spot not less than 40 feet away from where the Assistant Inspector was being attacked could not have observed which amongst a crowd of about 20 persons surrounding the deceased directly inflicted cuts or injuries on him. It also appears from the evidence that about this time the hut which had been set fire to had more than half burnt down and there was no other light in a dark night. In view of this criticism, the learned Judges observed, rightly, if I may say so, as follows : "It may be that having regard to the fact that the persons who chased Mr. Loane were 20 in number, these witnesses were not able to see the particular accused specified by them actually cutting and stabbing him. But there can be no doubt that these witnesses saw the accused specified by them among the persons who chased Mr. Loane and presumed that they participated in the actual attack."

This being their opinion on the direct evidence connecting the first accused with the murder, the learned Judges had to deal with the argument urged with reference to sections 34 and 149 of the Indian Penal Code. On this, they say : "Mr. Jayarama Iyer would have us hold that at the worst appellants 1 and 2 could be held guilty of murder only in virtue of section 149 and not section 34, Indian Penal Code, and he urges that in this view the lesser sentence should be awarded. We are unable to accept this contention. Having regard to the probabilities of human conduct, everyone who chased Mr. Loane cannot but be reasonably considered to have shared the intention to kill him." I understand this observation to imply that if the case had to be dealt with as one falling under section 302 read with section 149 of the Indian Penal Code, the learned Judges would not have been prepared to confirm the death sentence. They were obviously dealing with the case as one falling under section 34. I do not therefore think that we shall be justified in affirming the sentence of death independently of the question whether the case falls within section 34 or only under section 149. Even with reference to the distinction adverted to in the judgment just delivered by My Lord and my learned brother as to the practice in awarding sentence in cases falling under section 149, it would not be unimportant to ascertain whether the first accused was only among those who were said to have run to the spot where the Assistant Inspector was bayoneting some of their comrades or also himself took part in the assault upon the deceased.

There is this noticeable distinction in the evidence between the case against the second accused and the case against the first accused, namely, that both before the assault on the deceased and after the assault on the deceased, there is specific evidence that the second accused was armed with a hatchet and it was also the prosecution case that it was the second accused that cut P. W. 2 on the head with a hatchet. As regards the first accused, there is no specific evidence that he carried any other arm except a gun, though it is not clear at what stage of the proceedings he carried this gun. From the medical certificate relating to the wounds on the deceased, it is not possible to say that any of the wounds are likely to have been inflicted by the first accused, if he had only a gun and it is nobody's case that he fired the gun at any time. When the learned Judges of the High Court have not relied on the direct evidence of P. Ws. 1 to 5 to the effect that the first accused stabbed the deceased or cut him with an *aruval*, I do not think that those very statements can be relied on as proving that the first defendant carried an *aruval* or other cutting instrument ; nor would it be right to treat the matter as one in respect of which the burden of proof lay on the first accused, because this is not a case in which he was relying on any of the general exceptions or special exceptions or provisos. It is also not without some significance that the first accused is not mentioned by any witness as having inflicted any injury on the peons P. Ws. 1 to 5. I am therefore unable to draw the inference that the first accused must have taken some part in the *acts* which resulted in the death of the Assistant Inspector and

without such an inference it will be difficult to bring the case within section 34 of the Indian Penal Code.

Even as regards the question of " common intention," I am not at all sure that the learned Judges of the High Court were justified in assuming that those who chased Mr. Loane, "did so to wreak vengeance." The position was that after the shed had been set on fire, the crowd was dispersing in various directions and most of them had gone out of the compound of the salt factory. It was at this stage that Mr. Loane appeared on the scene and chased and bayoneted some members of the crowd who were actually running away. If at that stage some other members of the crowd who were on the point of dispersing went to the spot where their comrades were being attacked, it was quite likely, as the learned Judges also recognised, " that their main object was to rescue their comrades." But they follow this up with the remark, " the conclusion that they intended to effect that object by killing Mr. Loane is irresistible, as they must have realized that they could not achieve that object otherwise." I am not satisfied that this does not go too far. The scattering mob very probably acted only on an impulse to go and see what was happening to their comrades and it seems too much to impute to them sufficient knowledge or a common intention that they could or should be rescued by killing the Assistant Inspector. Our attention was drawn to the observations of the Judicial Committee in *Barendra Kumar Ghosh* v. *Emperor*[1]. That judgment proceeds on the footing that the common intention to kill the postmaster was clearly established and the *act* of the accused whose conviction was challenged was also proved beyond doubt, namely, that he had fired at the postmaster, though the shot missed and the postmaster was killed by a shot fired by another of the co-accused. There was accordingly no difficulty in holding that the case was covered by section 34, Indian Penal Code. The discussion was as to the result of its application. Here, the common intention of the crowd and some " act " on the part of the first accused have both to be inferred from the fact that the Assistant Inspector was murdered and that the accused was one of the crowd who ran to the place where the deceased was chasing some of the rioters.

The question however is bound up with inferences of fact with which it is not the ordinary practice of this Court to interfere and, as My Lord and my learned brother think that the death sentence was justified, I leave the matter there, with this expression of my doubt.

V. S. —— *Appeal dismissed.*

## [THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Madras.)*

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

T. V. Narasinga Rao and another .. *Appellants*†

*v.*

Vysyaraju Surayya Raju and another .. *Respondents.*

*Madras Agriculturists' Relief Act (IV of 1938), section 3 (ii), proviso D—Applicability—Holder of two "estates" one paying more and the other less, than Rs. 500 as peshkush—Transfer of the "estate" paying the higher peshkush to the province of Orissa when it was constituted into a separate province—Right to relief under the Madras Agriculturists' Relief Act—Government of India (Constitution of Orissa) Order (1936), paras. 11 and 26 and Regulation I of 1936, section 7—Scope and effect.*

The plaintiff and his sons mortgaged in 1929 their house in Berhampore and two villages *K* and *T*, all situated in the then Ganjam District of the Madras Province. In 1936 when Orissa was constituted into a separate province, *K*, which paid more than Rs. 500 as peshkush was incorporated in the Orissa Province, while *T*, which paid a peshkush of less than Rs. 500 was allowed to continue to be a part of the Madras Province. In March 1939, the plaintiff filed a suit (his sons being impleaded as defendants) praying for a redemption decree on the taking of accounts between him and his mortgagee in accordance with the provisions of the Madras Agriculturists' Relief Act

1. (1924) 48 M.L.J. 543 : L.R. 52 I.A. 40 : I.L.R. 52 Cal. 197 (P.C.).

*(1943) 1 M.L.J. 457 : I.L.R. 1943 Mad. 370.

† Case No. 4 of 1943. 17th February, 1944.

which had by that time come into operation. The plaintiff and his sons, as owners of *K* and *T* were 'landholders' of 'estates' and if both the 'estates' were taken into account they would be excluded from the definition of 'agriculturist' in section 3 (ii) of the Madras Agriculturists' Relief Act by reason of proviso D to the sub-section. But it was contended on behalf of the plaintiff that unless the 'estate' to be taken into account was situated within the Madras Presidency as now constituted its owner could not be held to fall within the description of a 'landholder of an estate under the Madras Estates Land Act, 1908' in proviso D to section 3 (ii) and that only an 'estate' which was governed by the Madras Estates Land Act in 1938, when the Agriculturists' Relief Act was enacted, could be comprehended by those words and that therefore the *T* estate only should be taken into account. It was further contended that the effect of section 7 of Regulation I of 1936 read with para. 11 of the Government of India (Constitution of Orissa) Order, 1936, was to terminate the operation of the Madras Estates Land Act *as such* in the transferred area and to enact for that area a new Act in the same terms, and as the Madras Estates Land Act was not *proprio vigore* in operation in that area *K* estate could not be an 'estate' included in the words of proviso D to section 3 (ii).

*Held*, that the words "landholder of an estate under the Madras Estates Land Act, 1908" occurring in proviso D to the definition of "agriculturist" in the Madras Agriculturists' Relief Act were applicable as well to an 'estate' in the areas transferred from the Madras Presidency to the Orissa Province as to an 'estate' which remained in the area now constituting the province of Madras and that hence the plaintiff was excluded from the benefit of the Act.

The object and effect of section 7 of Regulation I of 1936 as read in the light of paras. 11 and 26 of the Constitution of Orissa Order in Council was not to *enact* a law for the transferred area, but to provide how certain provisions of laws *assumed* to be in force in the transferred areas should be interpreted in view of the changed circumstances.

*N. Rajagopala Ayyangar* (with *A. S. Raghava Rao*) instructed by *Ganpat Rai*, Agent, for Appellants.

*Sir Alladi Krishnaswami Ayyar*, Advocate-General of Madras (with *Sardar Raghbir Singh* and *C. Sambasiva Rao*) instructed by *S. P. Varma*, Agent, for Respondent No. 1.

The Judgment of the Court was delivered by

*The Chief Justice.*—This appeal raises a short point turning on the construction of a clause in the Madras Agriculturists' Relief Act, 1938. That enactment made provision for the relief from indebtedness of persons comprehended in the definition of "agriculturist" in section 3 (*ii*) of the Act. Out of the general scope of this definition, certain classes of persons were excluded by four provisos. The fourth of these provisos, numbered D, excluded any person who was "a landholder of an estate under the Madras Estates Land Act, 1908, or of a share or portion thereof in respect of which estate, share or portion any sum exceeding Rs. 500 is paid as peshkush or any sum exceeding Rs. 100 is paid as quit-rent, *jodi*, *kattubadi*, *poruppu* or the like, or is a *janmi*, under the Malabar Tenancy Act, 1929, who pays any sum exceeding Rs. 500 as land revenue to the Provincial Government."

The appellants (father and son) are mortgagors who had executed a mortgage bond in favour of the first respondent on March 27th, 1929, securing repayment of a sum of Rs. 26,000, with compound interest at 14 annas per cent. per month, with yearly rests. The security comprised three items of property, namely, a house in Berhampore town, a village named Kumari in Kurla estate, Aska Taluk of the then Ganjam District, and a village named Tharlipeta, situate in the Tekkali Taluk, also included in the Ganjam District at that time. The appellants, as owners of Kumari and Tharlipeta, are "landholders" of "estates" and it has not been disputed that if both the "estates" are taken into account, the appellants will be excluded from the definition of "agriculturist" by reason of proviso D above set out, because the two estates taken together pay more than Rs. 500 as peshkush.

It, however, happened that when Orissa was constituted into a separate Province in April, 1936, the old Ganjam District of the Madras Presidency was divided into two parts, one portion being retained in the Madras Presidency and tacked on to the Vizagapatam District, the other portion being incorporated in the Orissa Province. The position now is that Kumari which pays more than Rs. 500 by way of peshkush has been included in the Orissa Province and Tharlipeta which pays a peshkush of less than Rs. 500 continues to be part of the Madras Presidency. The Madras Agriculturists' Relief Act became law on March 22nd, 1938, but

there was no similar legislation in Orissa till June, 1939. This suit was instituted on March 3, 1939, in a Subordinate Judge's Court in the Madras Presidency. The first appellant who was the sole plaintiff (his sons being impleaded as defendants) prayed for a redemption decree on the taking of accounts between him and the mortgagee; and he claimed that the accounts should be taken not on the basis of the terms of the bond, but in accordance with the provisions of the Madras Agriculturists' Relief Act.

It was contended on behalf of the appellants that to exclude a person by reason of proviso D to the definition of "agriculturist" in the Act, two conditions must co-exist, namely, that the estate to be taken into account must be an estate situate within the Madras Presidency and that a peshkush of not less than Rs. 500 must be payable to the Provincial Government of Madras. A case like the present does not seem to have been present to the mind of the Legislature. And as a matter of reason or policy, it is difficult to see why the Legislature should have thought of treating a person who owned two estates within the Province differently from one who owned two estates of which one was situate within the Province and the other in a neighbouring Province. The only question therefore is what is the effect of the language employed by the Legislature. It was recognised by counsel for the appellant that his contention as to the peshkush being payable to the Government of Madras could not receive support from the words "to the Provincial Government" at the end of proviso D, because the intervening words "*jodi*", "*kattubadi*", "*poruppu*", etc., might include payments to landholders and not to the Government and as a matter of grammar it would therefore be impossible to tack on the words "to the Provincial Government" to the words relating to "peshkush". It was nevertheless contended that that result must be reached, because clause (*a*) of the definition speaks of "land in the Province of Madras" and of the *assessment* being made by *the Provincial Government*. This does not seem to us to warrant the inference which we were asked by the appellants to draw. Clause (*a*) of the definition is the enabling provision, but the provisos are only in the nature of disabling or excluding clauses. A person must no doubt possess agricultural or horticultural land in the Province of Madras before he can at all become entitled to claim the benefit of the Act. But his *prima facie* claim on the ground of the possession of such property might, as shown by provisos A, B and C, be excluded even on account of his possession of properties outside the Province of Madras. The scheme of the provisos is that certain classes of persons are, by reason of their general financial position or the nature of the interest they possess in landed property, outside the category of those whom it was the policy of the Legislature to relieve by the provisions of the Act. The payment of peshkush exceeding a certain amount, like the payment of *kattubadi* or *poruppu* exceeding a certain amount was merely taken as a measure of the status or financial position of the payer; and for this purpose, it would make no difference whom the payment was made to. It may even be argued with some plausibility that the use of the words "to the Provincial Government" at the end of the proviso D and their absence after the words "paid as peshkush" in the middle of the proviso justifies the inference that in the latter case it was not intended to take into account only the amount of peshkush payable to the Madras Government.

The main argument in support of the appeal therefore was that unless the estate to be taken into account was situate within the Madras Presidency as now constituted, its owner could not be held to fall within the description of a "landholder of an estate under the Madras Estates Land Act, 1908" in the proviso. It was contended that only an estate which was governed by the Madras Estates Land Act in 1938, when the Madras Agriculturists' Relief Act was enacted, could be comprehended by these words and that we must therefore take into account only the Tharlipeta estate in the present case. A possible answer to this contention may be that the word "under" in the expression "under the Madras Estates Land Act" only means "as defined in"; in this view, the reference to that Act would only be a way of describing the property and need not necessarily imply that the estate.

should be *governed* by the provisions of that Act. It is however unnecessary to base our conclusion on this ground. It was admitted on behalf of the appellants that the Madras Estates Land Act was even now in force in the areas transferred to the Orissa Province from Madras and that Kumari was therefore governed by that Act. But it was argued that the Act was not *proprio vigore* in operation in the transferred territory and that therefore the Kurla estate could not be an estate included in the words of proviso D. It will be convenient to refer to a few statutory provisions and Orders before examining this contention.

Section 289 of the Constitution Act provided for the formation of the Province of Orissa and the incorporation therein of such areas separated from the Presidency of Madras as might be specified in an Order in Council. Under sub-section (2) of that section, the Order in Council may contain provisions with respect to the laws which, subject to amendment or repeal by the Provincial or, as the case may be, the Federal Legislature, are to be in force in any part of Orissa. The Constitution of Orissa Order, 1936, came into operation on April 1, 1936. While transferring certain areas from the Madras Presidency to the Orissa Province, para. 26 of that Order provided that the provisions of the Order should not be deemed to have effected any change in the territorial application of any enactment, notwithstanding that that enactment was expressed to apply or extend to the territories for the time being under a particular administration. If the matter had stood here, there could be little doubt that the Madras Estates Land Act would have continued to operate *proprio vigore* in the transferred areas, in spite of their transfer to the Orissa Province. The Order, however, contains another provision (para. 11) in the part relating to the transitional period, that is, the period between April 1, 1936, and April 1, 1937. Para. 11 states that the provisions of section 71 of the Government of India Act (meaning the Act of 1915) shall apply to the whole of Orissa and Regulations may be made thereunder accordingly. Under this power, the Governor-General in Council made Regulation I of 1936, entitled a Regulation to declare the law in force in the Province of Orissa. This Regulation terminated the operation of certain Madras Acts in the transferred areas, but as regards other enactments, it made the following provision by section 7:

"Subject to the provisions of paragraphs 16 and 17 of the Government of India (Constitution of Orissa) Order, 1936, all enactments, other than enactments repealed by this Regulation, made by any authority in British India and all notifications, orders, etc., which were immediately before the first day of April, 1936, in force in any of the areas comprised in the Province of Orissa shall, in their application to such areas, be construed as if references therein by whatever form of words to the authorities, territory or Gazettes mentioned in column 1 of the First Schedule were references to the authorities, territory or Gazettes respectively mentioned or referred to opposite thereto in column 2 of the said Schedule."

In the schedule, item 3 (*a*) directs that "the Presidency of Madras" must be construed as referring to "the areas separated from the Presidency of Madras and forming part of the Province of Orissa." It has been contended on behalf of the appellants that the result of this Regulation, read in the light of para. 11 of the Orissa Order in Council, was to terminate the operation of the Madras Estates Land Act *as such* in the transferred areas and to enact for this area a new Act in the same terms. We are unable to accede to this contention. Para. 11 of the Order in Council must be read along with para. 26 and reading the Regulation in the light of these two provisions, it is reasonably clear that its object and effect was not to *enact* a law for the transferred areas, but to provide how certain provisions of laws *assumed* to be in force in the transferred areas—obviously under para. 26 of the Order in Council—should be interpreted in view of the changed circumstances.

It was next argued that the proviso to para. 8 of the Adaptation of Indian Laws Order, 1937, had a material bearing on the case. The para. is in the following terms:

"In any Indian law in force immediately before the commencement of this Order, any reference by name or description to any territory shall, unless the contrary intention appears or unless it has been, or is by this Order, otherwise expressly provided, be construed as a reference to the territory which bore that name or answered to that description at the date when the enactment containing that name or description came into operation."

The proviso says :

"that in the application of any enactment to Madras, Bombay, Bihar or the Central Provinces, references in that enactment to Madras, Bombay, Bihar or the Central Provinces, as the case may be shall be construed as exclusive of so much of those Provinces respectively as was separated therefrom, on the constitution of the Provinces of Orissa and Sind."

Two contentions were founded on this proviso : (1) that after the promulgation of this Order (which came into operation on April 1, 1937), all Madras Acts which theretofore continued to operate in the transferred areas ceased so to operate, and (2) that the word "Madras" used in any subsequent Madras enactment like the Agriculturists' Relief Act could only refer to the Madras Presidency exclusive of the transferred areas. The second contention does not seem to us to be correct in that broad form. Being only a proviso to what is contained in the main portion of para. 8, the proviso can affect only laws in force before April 1, 1937, because it is only those laws, that are dealt with by the opening words of para. 8. Further, the word "Madras" in the expression "Madras Estates Land Act" is only a part of the *description* of the Act and does not bear on the "application of the enactment". And the first contention does not seem to be warranted by the language of the proviso. Its purpose is not to terminate the operation of any law in any particular area, but only to provide a particular rule of construction and even that only in respect of "the application of any enactment to Madras." It appears to us that this proviso did for the rest of the Madras Presidency what section 7 of Regulation I of 1936 did for the transferred areas, the underlying assumption in both cases being that the pre-existing laws continued to operate as before, subject to the rule of construction enacted by the Regulation and by para. 8 of the Order in Council respectively.

We accordingly think that the words "landholder of an estate under the Madras Estates Land Act, 1908," occurring in proviso D to the definition of "agriculturist" in the Madras Agriculturists' Relief Act, 1938, are applicable as well to an estate in the areas transferred from the Madras Presidency to the Orissa Province as to an estate which remained in the area now constituting the Province of Madras. The learned Judges of the High Court at Madras were therefore right in holding that the appellants were excluded from the benefit of the Madras Agriculturists' Relief Act, 1938.

It is stated in the judgment of the High Court that the only contention urged in the appeal related to the claim to relief under the Madras Agriculturists' Relief Act. We were however told that a claim was also made for relief under the Orissa Moneylenders' Act, as per ground No. 9 in the memorandum of appeal to the High Court. As we have already stated, the Orissa Act was passed only in June, 1939, and no relief on the basis thereof could have been claimed in the plaint. The Advocate-General of Madras who appeared for the contesting respondent admitted that the contention based on the Orissa Act was mentioned by counsel for the appellant when he opened the appeal before the High Court, but he added that the contention was not persisted in when he pointed out certain objections to the sustainability of the claim. He was however not prepared to say that the contention was abandoned. Before us, he mentioned three *prima facie* objections: (1) that the question whether the contesting respondent was a money-lender within the meaning of the Orissa Act might have to be tried as a question of fact ; (2) that Orissa Act made provision only for cases where a money-lender was suing as a *plaintiff*, which is not the case here ; and (3) that the relevant section in that Act was framed only as a direction to the Court not to award more than a certain amount by way of interest and that the Orissa Legislature could give such a direction only to Courts situate in that Province and not to Courts situate in other provinces. As we propose to remit the case to the High Court for a consideration of the questions arising under the Orissa Act, we do not wish to say anything that may seem to prejudge the issue or prejudice either side. We required the Advocate-General to mention his objections only to see whether they were so obviously well-founded

as to make a remand unnecessary. As regards the second and third objections, we are not satisfied that there may not be answers which should at least be considered by the Court whilst the possibility that it might be necessary to have further facts found could not be allowed to deprive the appellants of their rights under the Orissa Act, if otherwise they should be found entitled thereto. In a redemption suit, the accounts between the parties have to be taken once for all and their rights declared and it will not be just to deprive the appellants of an opportunity of putting forward their claim under the Orissa Act. If necessary, it will be for the High Court to direct the Court of first instance to try any issues of fact that this aspect of the case may be found to involve.

It was suggested before us that the appellants' claim to relief under the Orissa Act might once for all be heard and decided by this Court. This did not seem to us to be the appropriate course to adopt. It would deprive us of the benefit of a judgment of the High Court on the point and, as above indicated, it might be necessary in a particular view to direct a trial of questions of fact. We accordingly set aside the decree of the High Court and remit the case with a direction that the High Court shall hear and determine the appellants' claim to relief under the provisions of the Orissa Money-lenders' Act and pass such further decree or order as may seem to it appropriate in the light of the conclusion that it may come to on that question.

The appellants have failed on the only point which they pressed before the High Court; and for the omission of the High Court to deal with the question raised under the Orissa Act, the appellants are themselves to blame. They must accordingly pay the costs of the first respondent in this appeal.

V. S. ——— *Decree set aside and case remitted.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Tadepalli Sarojini devi minor by father and next friend Tadikonda Ramakrishna Rao .. *Appellant**

*v.*

Tadepalli Sri Kristna Anjaneya Subramanyam and others .. *Respondents.*

*Hindu Women's Rights to Property Act (XVIII of 1937)—Applicability—Mango-grove—If " agricultural land " to which Act has no application—Government of India Act (1935), sehedule VII—Lists II and III—Entries—" Agriculture "—Meaning—Widow—Right to maintenance—Quantum—Suit for partition by woman under Hindu Women's Rights to Property Act—Common charges on family estate—How to be dealt with.*

For the purposes of the relevant entries in lists II and III of schedule VII of the Constitution Act, the expression " agricultural lands " must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry. It follows that a mango grove forming part of an estate is " agricultural land " in respect of which the Hindu Women's Rights to Property Act, 1937, does not operate to regulate succession.

Decisions under various enactments as to the meaning of " agricultural land," discussed.

A widow is entitled to maintenance notwithstanding her right under the Act to a share in the non-agricultural part of the family estate which however will be taken into account in determining the amount payable as maintenance.

*Venkata Subbarattamma* v. *Krishniah*, (1943) 1 M.L.J. 235, approved.

Mode of dealing with the common charges on the family estate in a suit for partition by a woman entitled to a share under the Hindu Women's Rights to Property Act pointed out.

Appeal against the decree of the District Court of Kistna at Chilkalapudi in O. S. No. 5 of 1940.

*Ch. Raghava Rao* for Appellant in Appeal No. 311 of 1942 and for Respondent in Appeal No. 380 of 1942.

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* Appeals Nos. 311 and 380 of 1942. 4th February 1944.

*K. Bhimasankaram* for Respondents in Appeal No. 311 of 1942 and for Appellant in Appeal No. 380 of 1942.

The Judgment of the Court was delivered by

*Patanjali Sastri, J.*—These two connected appeals have been brought from a preliminary decree in a partition suit. One Ramachandra Rao died on 23rd February, 1939, leaving him surviving his widow (plaintiff), two sons (defendants 1 and 2) and an unmarried daughter by his predeceased wife (3rd defendant) and his mother (6th defendant). The sons and daughter being minors were represented by their maternal grandfather the 4th defendant who was appointed as their guardian for the suit. The fifth defendant was a stranger with whom Ramachandra Rao carried on business in partnership as retailer of fancy goods under the style of Friends and Co. Soon after the death of Ramachandra Rao there were magisterial proceedings and inventories were prepared of the moveables in the house including the articles belonging to Friends and Co., which had its shop in the front rooms of the same premises. The plaintiff sued for partition and delivery of a third share of Ramachandra Rao's properties which were set out in five schedules annexed to the plaint.

As Ramachandra Rao died undivided from his sons, the plaintiff's right to a share could only be based on the Hindu Women's Rights to Property Act, 1937, and though the claim was originally made in respect of all the properties it was conceded that she was not entitled to a share in the agricultural lands forming part of the estate, as it has since been held by the Federal Court that the Act does not operate to regulate succession to agricultural land in the Governor's Provinces but operates only in respect of other kinds of property (*See* In re *the Hindu Women's Rights to Property Act*[1]). In the absence of parallel legislation by the Legislature of this Province in regard to agricultural land this decision has given rise to new problems in apportioning or allocating, among the full and partial co-sharers, the common obligations to be borne by the estate as a whole, such as claims of creditors, maintenance holders, and unmarried daughters, and some of those problems arise for consideration in the present case.

The first contention raised by Mr. Raghava Rao for the plaintiff relates to a mango-grove (item 36, Schedule A) forming part of the estate. The Court below negatived the plaintiff's claim to a share therein on the ground that it is agricultural land succession to which is not regulated by the Hindu Women's Rights to Property Act. While it has been held in the decision already referred to that succession to "agricultural land" is a subject within the exclusive competence of the Provincial Legislature, there is no indication in the judgment as to what is "agricultural land" within the meaning of the entries No. 21 of List II and No. 7 of List III of Schedule VII of the Government of India Act, 1935. No case throwing light on the point has been brought to our notice though numerous decisions were cited as to the connotation of the term "agricultural" or "agriculture" occurring in various other enactments relating, for the most part, to tenancy legislation in this and other Provinces. Many of these statutes contain their own definitions of the term and even where there is no definition the term had to be interpreted in the light of the object and general policy underlying the particular enactment and of other indications afforded by it. It seems to us therefore not profitable to discuss in detail any of those decisions as they cannot afford any useful guidance in the interpretation of the expression "agricultural land" in the Constitution Act. That Act has not defined the term which has accordingly to be interpreted in its ordinary sense controlled, no doubt, by the context of the Act.

It is somewhat remarkable that a word in such common use as "agriculture" should have given rise to a great divergence of judicial opinion in regard to its interpretation. In *Murugesa Chetty* v. *Chinnathambi Goundan*[2], Bhashyam Aiyangar, J., pointed out that the word was susceptible of a wider and a narrower interpretation

1. (1941) 2 M.L.J. 12 : (1941) F.C.R. 12. 2. (1901) I.L.R. 24 Mad. 421

and that in its more general sense signified " not only all field cultivation by tillage but also all garden cultivation for the purpose chiefly of procuring vegetables or fruits as food for man or beast and other products fit for human consumption by way of luxury, if not as an article of diet." Shepherd, J., was of opinion that in ordinary parlance neither a man who planted fruit trees or bushes in an enclosed space nor still less one who planted and maintained trees for firewood or other such purposes would be called an agriculturist. He recognised, however, that the word " agriculture " was capable of being applied to tillage of the soil in its widest sense and agreed with his learned colleague that the lease of a betel garden was a lease for " agricultural purposes " within the meaning of section 117 of the Transfer of Property Act which does not contain a definition of the term. In *Rajah of Venkatagiri* v. *Ayyappa Reddi*[1], Sadasiva Ayyar, J., expressed the opinion that the ordinary meaning of agriculture was the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc. In *Panadai Pathan* v. *Ramaswami Chetti*[2], Spencer, J., criticised the definitions of Bhashyam Ayyangar, J. and Sadasaiva Ayyar. J. as being too narrow as they would exclude cultivation of flower, indigo cotton, jute, flax, etc., from agriculture. According to him " agriculture " connotes " the raising of useful or valuable products which derive nutriment from the soil with the aid of human skill or labour " and will include " horticulture, arboriculture, and silviculture in all cases where the growth of trees is effected by the expenditure of human care and attention in such operations as those of ploughing, sowing, planting, pruning, manuring, watering, protecting, etc." Ramesam, J., referred to the definitions in several dictionaries and English statutes and was inclined to think that the term would include the rearing of any plants requiring " some preparation of the ground and subsequent care by watering the plants." The learned Judges held that growing casuarina trees was an agricultural purpose under section 117 of the Transfer of Property Act. These views were in turn criticised by Reilly, J., in *Chandrasekhara Bharathi Swamigal* v. *Doraiswami Naidu*[3], as being the " result rather of stretching than of defining the word " agriculture " and as ignoring the first two syllables of that word. The learned Judge thought that according to its derivation it meant the cultivation of an open space as opposed to horticulture the cultivation of a comparatively small enclosed space. He would reject the test based on the nature of the products cultivated and define the term " rather by the circumstances in which the cultivation is carried on." He was accordingly of opinion that " the planting of timber or firewood trees which are to stand on the land for a considerable number of years, forming plantations or woods or forests was opposed to the idea of agriculture the cultivation of an open space," notwithstanding that it might be necessary, for the purpose of growing such trees, first to prepare the land and later on to protect and water them. Relying also on certain indications in the Madras Estates Land Act he held, with the concurrence of Ananthakrishna Ayyar, J., that growing casuarina trees for fuel was not an agricultural purpose within the meaning of that Act. It is unnecessary to refer to the decisions of the other High Courts as those to which reference has been made sufficiently illustrate the difficulty in defining the term which admits of different interpretations.

Mr. Raghava Rao however claimed that the decision of the Privy Council in *Kesho Prasad Singh* v. *Sheo Pargash Ojha*[4], practically concluded the point in his favour, as it related more or less to the same kind of property as we are now considering, namely, grove land. It was a pronouncement on appeal from the decision in *Kesho Prasad Singh* v. *Sheo Pragash Ojha*[5], where, following a line of cases decided by that Court, it was held that land granted by a zamindar " for the purpose of planting a grove the grantee agreeing to deliver one half of the fruit to the zamindar " was not " land held for agricultural purposes " within the meaning of the Agra Tenancy Act. It would, however, appear that the earlier decisions in that province were based on the peculiar status of 'grove-holders pure and simple' who had no rights in the land after the trees were cut. Their Lordships simply expressed their agree-

1. (1915) 25 M.L.J. 578 : I.L.R. 38 Mad. 738.
2. (1922) I.L.R. 45 Mad. 710.
3. (1931) 61 M.L.J. 648 : I.L.R. 54 Mad. 900.
4. (1924) 47 M.L.J. 824 : L.R. 51 I.A. 381 : I.L.R. 46 All. 831 (P.C.).
5. (1924) I.L.R. 44 All. 19 (F.B.).

ment with the opinion of the High Court that "it is impossible to hold that that section (section 79) has any application whatever to such a property as the grove in fact is." There is no discussion as to the connotation of the term "agriculture," and no test of any general application is indicated. We cannot therefore regard the decision as a conclusive authority on the question we have to decide in this case.

As we have already pointed out, the term "agriculture" is used in different senses and in order to ascertain in what sense it is used in the Legislative Lists in Schedule VII of the Constitution Act, we must have regard to the object and purpose of section 100 of which these Lists really form part. That section deals with the distribution of Legislative powers as between the Federal and Provincial Legislatures, and the Lists enumerate the "matters" in respect of which those Legislatures have or have not power to make laws. In such context it seems to us that the expression "agricultural land" must receive the widest meaning, for it would be somewhat grotesque to suppose that Parliament intended that lands devoted to the production of one kind of crop should devolve according to laws passed by Provincial Legislatures, while those used for growing another kind should pass according to laws made by the Central Legislature, or that "the circumstances in which the cultivation is carried on" (per Reilly, J., in *Chandrasekhara Bharathi Swamigal* v. *Doraiswami Naidu*[1]) should determine the law which governs the devolution of the land. Nor could it have been intended that succession to such lands should depend on the degree of tillage or preparation of the soil or of the skill and labour expended in rearing and maintaining the plants. We are of opinion that for the purposes of the relevant entries in Lists II and III of Schedule VII, the expression "agricultural lands" must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry. It follows that the mango grove in question is agricultural land in respect of which the Hindu Women's Rights to Property Act, 1937, does not operate to regulate succession.

The only other items of schedule A as to which the plaintiff raised any objection before us are 31 and 32 a house and a site, which the fourth defendant, who was managing the properties on behalf of defendants 1 and 2 as their guardian, sold for Rs. 1,750 during the pendency of the suit. It was objected that the sale was for a low value and could not bind the plaintiff, but the lower Court has observed that neither the sale nor the price was questioned, and it has decreed to the plaintiff her share of the sale proceeds. The objection cannot therefore be entertained at this stage.

The objections relating to the movables comprised in schedules B and B-1, however, require more serious consideration. Before dealing with these objections, it is necessary to mention that Ramachandra Rao was the adopted son of one Bapanayya who had two divided brothers, Subba Rao and Sriramulu. Subba Rao died in 1931 leaving a will whereby, after making certain bequests he left the residue of his properties, movable and immovable, to his wife to be enjoyed for her lifetime and, after her death, to his brothers Bapanayya and Sriramulu. Subba Rao's widow died in 1933. The residue of Subba Rao's estate thereupon passed to Bapanayya and Sriramulu who having become divided were living separately. Evidently, these brothers must have divided the properties thus obtained by them under Subba Rao's will and these must have included movables. Sriramulu who was examined as a witness no doubt denied that any movables of Subba Rao came either to himself or to Bapanayya. But it is difficult to believe this statement as it is common ground that among the movables found in the house of Bapanayya's adopted son Ramachandra Rao were several articles bearing the initials of Subba Rao. It is therefore probable, as suggested, for the plaintiff, that Subba Rao left some movable properties, that these were divided between the surviving brothers Bapanayya and Sriramulu and that those got by Bapanayya for his share passed to Ramachandra Rao and were accordingly found in his house. Now, the learned District Judge disallowed the plaintiff's claim to a share in the movables

1. (1931) 61 M.L.J. 648 : I.L.R. 54 Mad. 900.

which bear the initials of Subba Rao, and the plaintiff's contention is that she should have been given a third share in these items as well. In view of what we have stated above, the contention must be accepted and she will be allowed a third share in these items.

The plaintiff's claim to a share in item 318 of B-1 schedule must also succeed for the same reason. This item also bears the name of Subba Rao and it is referred to as the "big iron safe" in the inventory, Ex. P-1. While the learned District Judge has allowed the plaintiff's claim to three other iron safes found in the house, he excluded this item from the divisible properties remarking merely that "it is not likely to have been owned by Ramachandra Rao." Sriramulu claimed a "big iron safe in the shop of Ramachandra Rao" referring probably to this item. But there is no acceptable evidence in support of his claim and for the reasons we have already indicated in connection with the other items bearing the initials of Subba Rao, the plaintiff must be allowed a share in this item also.

Then, as regards the jewels and gold and silver articles comprised in B and B-1 schedules the defendants claimed that the items specified in paragraph 17 (*a*) of their written statement belonged to the sixth defendant as her stridhanam properties and that the items specified in paragraph 17-b, belonged to Raghavamma, the predeceased first wife of Ramachandra Rao, which on her death passed to the third defendant, her daughter. The Court below upheld the claims of defendants 3 and 6 and excluded these items from the division. The plaintiff objects that these items were not the *stridhanam* jewels of the sixth defendant or of Raghavamma but were family jewels in which she was entitled to a share. But, as pointed out by the learned Judge, the evidence that Ramachandra Rao owned any jewels as family jewels, that is, jewels not belonging to any particular lady of the family but belonging to the family itself, which any lady of the family might wear as occasion arose, is meagre and not acceptable. The only witness who speaks to the existence of such family jewels, namely, the plaintiff's father, while saying that rich Vysia families have family jewels, admits that he does not know personally whether Ramachandra Rao had any such jewels. On the other hand, the paternal uncle of Ramachandra Rao, his natural father and his adoptive mother, have all deposed that there were no jewels owned by Ramachandra Rao's family apart from jewels belonging to one or other of the ladies of the family. The plaintiff herself claims that the jewels which she is wearing on her person are her own and do not belong to the family. It was admitted by her father that the sixth defendant had jewels worth about Rs. 5,000, though he added that she gave them away to her brother. The latter, however, denied that any jewels had been given to him by the sixth defendant. There is also other evidence that the sixth defendant had jewels worth about Rs. 6,000 and that Raghavamma had jewels of considerable value, worth about Rs. 7,000 or 8,000. In such circumstances, the conclusion of the learned Judge that there were no family jewels owned by Ramachandra Rao, that all the jewels in the possession of the family belonged to one or other of the ladies in the family and that, the plaintiff having taken away her jewels, those now found in the family house should be taken to belong to the other ladies is, in our opinion, correct. It follows that the plaintiff is not entitled to any share in the jewels now claimed by the sixth and third defendants respectively in paragraph 17 (*a*) and (*b*) of their written statement.

These paragraphs, however, include not merely items of jewels, but also other items which are gold and silver vessels. It seems to us that the plaintiff's claim to a share in these articles stands on a different footing. While it may well be presumed that the jewels found in the possession of a family belong to one or other of the ladies of the family as *stridhanam* property in the absence of any clear evidence that they are family jewels, no such presumption can safely be made in respect of the gold and silver vessels and articles in the possession of the family. As regards these movables we consider that they must be treated as belonging to the family unless there is clear evidence that they belong to one or other of the ladies

of the family and the plaintiff must be allowed a share in these items. The evidence will have to be examined from this standpoint.

The next contention in the plaintiff's appeal relates to her claim with reference to the outstandings due to Friends and Co., and the articles constituting its stock on hand at the time of dissolution. These are covered by schedules C and D of the plaint respectively. As already stated, Ramachandra Rao was a partner with the fifth defendant in the fancy goods trade and the partnership must be deemed to have been dissolved on the death of Ramachandra Rao. The plaintiff's claim as against the fifth defendant must therefore be viewed as one made by one of the representatives of a deceased partner for an account of the dissolved partnership against the surviving partner, the other representatives being also made parties to the suit. Having assumed that there were no liabilities of the firm to pay, the plaintiff merely prayed for her share in the outstandings alleged to be due to the firm and the articles found in the premises at the time of Ramachandra Rao's death. But it cannot be disputed that the plaintiff's claim as against the fifth defendant was really one for taking accounts of the dissolved partnership and for payment to her of her share of what might be found to be payable to the deceased partner. The plaintiff valued in her plaint the stock on hand of Friends and Co., and outstandings due to that firm as on the date of dissolution at about Rs. 8,000. In answer to this claim it was pleaded that the net assets of the firm at the time of the death of Ramachandra Rao did not exceed Rs. 3,000 in value of which the half share of Ramachandra Rao, was only Rs. 1,500, and that no claim to relief in respect of the dissolved partnership could be joined in this suit. The plea of misjoinder was negatived by the lower Court and was not pressed before us. In the course of the trial, the fifth defendant put forward an arrangement between himself and the fourth defendant acting as the guardian of defendants 1 and 2, whereby it was settled that, at the time of Ramachandra Rao's death, the outstandings due to the firm should be valued at about Rs. 1,000 and the stock on hand at about Rs. 2,000, and that these should be taken over by the fifth defendant on his paying to the fourth defendant Rs. 1,650 representing half their value to the share of Ramachandra Rao. According to the fifth defendant the arrangement as well as the taking over of the assets by him was in 1939. The valuation was said to have been made by the fourth defendant and two other persons after making enquiries of some shop-keepers. But these persons called by the defendants as witnesses do not support the story ; and neither the receipts which are said to have passed between the fourth and fifth defendants at the time of the arrangement nor the account books of the firm, which are admittedly in existence and in which entries relating to the arrangement and the consequent payment would have been made if it was true, have been produced. In such circumstances there is room for serious doubt as to whether the alleged arrangement of 1939 was true, more especially as it was not put forward in the written statements of the defendants which were filed in September, 1940. In any case, it is admitted that the plaintiff was not a party to the alleged arrangement which cannot therefore bind her even if it was true. The learned District Judge has, however, accepted the fifth defendant's story as to the arrangement and, being of opinion that it was a fair one, has held that it was binding on the plaintiff though she was not a party to it. For the reasons already indicated, we are unable to agree with the learned Judge's conclusion on this part of the case. The fifth defendant who has admittedly taken charge of all the assets of the firm as they stood at the time of the death of Ramachandra Rao is bound to account to the plaintiff for her share of the net assets due to the deceased partner at the time of the dissolution, with subsequent interest at six per cent. per annum.

The only other dispute raised in the plaintiff's appeal relates to her right of maintenance. As already stated, in her plaint which was filed before the decision of the Federal Court referred to above, the plaintiff claimed a third share of the entire family estate, but in view of that decision the claim, so far as it related to

agricultural lands which form a considerable portion of the estate, has failed. It is therefore urged for the plaintiff that she is entitled to maintenance as against these properties which have passed exclusively to defendants 1 and 2 and that such maintenance should also be provided for in this suit. As there is no prayer for this relief in the plaint, we have acceded to the plaintiff's request to allow her to amend the plaint suitably so as to raise this matter. The question accordingly arises, whether, notwithstanding the right to a share in the non-agricultural properties of the family allowed to her under the Hindu Women's Rights to Property Act, 1937, the widow of a deceased coparcener is still entitled to any right of maintenance as under the ordinary Hindu law. It seems to us that this question must be answered in the affirmative. It may well be that, if the Act conferred upon the widow a right of succession in respect of all her husband's property, the right of maintenance allowed to her under the ordinary Hindu law as compensation for her exclusion from inheritance would no longer be available, although nothing is said in the Act about rights of maintenance. But that is not the position according to the decision of the Federal Court already referred to. The widow still stands excluded from succession to agricultural land in the absence of provincial legislation on parallel lines in respect of such land. It cannot, therefore, be said that the reason of the right has ceased to exist and the right is gone. It would be strange and anomalous if, as a result of an enactment designed to give " better rights " to the widow, she were to be placed in a worse position by being deprived of her pre-existing right of maintenance, with consequences which may well prove disastrous where the bulk of her husband's joint or separate property consists of agricultural land. We are therefore of opinion that the plaintiff is entitled to maintenance notwithstanding her right under the Act to a share in the non-agricultural part of the family estate. This share will, of course, be taken into account in determining the sum payable to her. A similar conclusion, it may be observed, was reached by King, J., in *Venkata Subbarattamma* v. *Krishniah and others*[1].

The main contentions raised in the defendant's appeal were in regard to the provision to be made for certain common charges on the family estate. The third defendant claimed that a provision should be made for her maintenance until her marriage and for her marriage expenses. She also claimed that the jewels of her mother Raghavamma, the predeceased first wife of Ramachandra Rao, having been given away by the latter to the plaintiff, their value should be paid to her as the *stridhanam* heir of her mother out of the estate as a liability incurred by Ramachandra Rao. The sixth defendant the adoptive mother of Ramachandra Rao also claimed maintenance for herself. These claims were the subject-matters of issues 6 to 9, but the learned Judge below has left them undetermined, as in his opinion it would be unfair to charge the limited property in which the plaintiff is entitled to a share with these liabilities which should be more appropriately dealt with at a general partition of all the family properties between defendants 1 and 2. While it would no doubt, be unfair to the plaintiff to debit the common liabilities chargeable to the family estate as a whole against the non-agricultural part of it, for that would result in the agricultural lands in the hands of the defendants, which in this case form the bulk of the family estate, escaping their just share of the burden, it would on the other hand, be unfair to defendants 1 and 2 to give the plaintiff her share in the non-agricultural part freed from these liabilities as the learned Judge has done, for this could have the result, overlooked by him, of making these defendants solely responsible for the payment of these charges. It seems to us that the only equitable way of dealing with these common liabilities will be to apportion them between the non-agricultural part of the estate and the agricultural lands according to their respective value after ascertaining the same, though these lands do not fall to be partitioned in this suit, and to charge to the share decreed to the plaintiff a proportionate part of what is found debitable to the non-agricultural part of the estate on such apportionment. It was said that such an apportionment would not have due regard to the fact that while the plaintiff gets only the limited

1. (1943) 1 M.L.J. 235.

estate of a widow in the share allowed to her under the new Act, the shares of defendants 1 and 2 have passed to them absolutely. But it is to be remembered that the liabilities are a charge on the estate as a whole, and what is divisible among the co-sharers is only the residue after setting apart what is necessary to meet these liabilities. The fact that the widow is given only a limited right under the Act in the net divisible fund can have no relevance in the apportionment of the liabilities among those who share it. We accordingly direct that provision should be made for the maintenance and marriage expenses claimed before the plaintiff is given a decree for her share in the assets divisible in this suit.

As regards the third defendant's claim for the value of her mother's jewels alleged to have been given to the plaintiff by Ramachandra Rao, we consider that she should seek her remedy in a separate suit as it raises various questions which cannot be conveniently gone into in this suit.

A minor point was raised as regards the date from which the plaintiff was to be awarded mesne profits in respect of the third share of the immovable properties other than agricultural lands allowed to her. The lower Court held that she was entitled to such profits from the date of the death of Ramachandra Rao. This is clearly wrong as the plaintiff admits in her plaint that she was in joint possession of the properties till the date of suit. She will therefore get mesne profits only from that date.

In the result, both appeals are allowed to the extent indicated and the case is remanded to the lower Court for passing a revised preliminary decree in the light of this judgment, after making such further enquiry as may be found necessary in that behalf. Parties will have liberty to adduce fresh evidence on all matters relevant to the enquiry. In A. S. No. 311 of 1942, the plaintiff's costs as against the fifth defendant will abide and follow the result. Otherwise we make no order as to costs. In A. S. No. 380 of 1942, the appellants 3 and 5 will be entitled to costs proportionate to their success and such costs will abide and be provided for in the revised preliminary decree. The lower Court will make its own order as to costs in that Court. The court-fee on the memoranda of appeal and cross appeal will be refunded.

K.S. — *Appeals allowed in part and case remanded.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT AND MR. JUSTICE BELL.

VE. RM. N. R. Somasundaram Chettiar .. *Appellant**

*v.*

CT. VE. Kannammai Achi and others .. *Respondents.*

*Civil Procedure Code (V of 1908), Order 40, rule 4 (2)—Scope of—Allegations against receiver that he is guilty of fraudulent conduct and misappropriation—Matter must be referred to a suit.*

The Court has to consider in an application made under Order 40, rule 4 (2) of the Civil Procedure Code, (*a*) whether it is alleged that money is due as shown by the receiver's accounts and/or (*b*) whether there is an allegation of loss occasioned by the receiver's wilful default and gross negligence. If either of these two conditions are present, then the Court may so far as the accounts are concerned send them to be scrutinised and reported on by a commissioner in order to save the time of the Court. With regard to wilful default the Court may hold an enquiry, the materials for which may be scrutinised in the first instance by some outside person. The Court has the further power, where the accounts are disputed or are of a complicated nature or where loss has been occasioned by wilful default or gross negligence to refer the parties to a suit. But where there is any charge of fraud involved, then he must deal with that himself or direct the parties to a suit.

Where the main allegation in an application was that the receiver had been guilty of fraudulent conduct and misappropriation, the order by the Subordinate Judge referring so serious a matter to a commissioner is wrong and the case as presented is suitable for a suit and for no other procedure.

*Manicka Mudaliar* v. *Andalammal,* (1940) 1 M.L.J. 356 : I.L.R. (1940) Mad. 636, followed. *Coomar Satya Sankar* v. *Ranee Golapmonee Debee,* (1900) 5 C.W.N. 223 and *Sureshchandra* v. *A. K. M. Enamel,* (1935) 40 C.W.N. 479, distinguished.

* A. A. O. No. 328 of 1943. 24th January, 1944.

Appeal against the order of the Court of the Subordinate Judge of Devakottai dated 22nd April, 1943, and made in C. M. P. No. 641 of 1942 in O. S. No. 217 of 1934.

*S. Panchapagesa Sastri* and *T. S. Vaidyanatha Aiyar* for Appellant.

*C. Padmanabha Aiyangar, A. Sundaram Aiyar, M. S. Krishnamurthi Sastri* and *T. K. Sundararaman* for Respondents.

The Court delivered the following

JUDGMENTS : *Mockett, J.*—It is unnecessary to set out the history of the suits in which the appellant was appointed as a receiver. It is enough to say that he was appointed receiver in two suits, O. S. No. 217 of 1934 of the Subordinate Judge's Court of Devakottai and O. S. No. 172 of 1936, later O. S. No. 13 of 1939 of the Subordinate Judge's Court of Sivaganga. In O. S. No. 13 of 1939 certain charges were made against the receiver (appellant) which were withdrawn and he obtained his discharge. He has not obtained his discharge in O. S. No. 217 of 1934. The present I. A. No. 641 of 1942 was an application by the respondents under Order 40, rules 3 and 4 and section 151 of the Civil Procedure Code. Order 40, rule 3 is as follows :

" Every receiver so appointed shall,

... ... ... ... ... ...

(*b*) submit his accounts at such periods and in such form as the Court directs ;

... ... ... ... ... ... ...

(*d*) be responsible for any loss occasioned to the property by his wilful default or gross negligence."

We are more concerned with rule 4, which says :

" (1) If a receiver fails to submit his accounts at such periods and in such form as the Court directs, the Court may order his property to be attached until he duly submits his accounts in the form ordered.

(2) The Court may, at the instance of any party to any suit or proceeding in which a receiver has been appointed or of its own motion, at any time make an enquiry as to what amount, if any, is due from the receiver as shown by his accounts or otherwise, or whether any loss to the property has been occasioned by his wilful default or gross negligence, and may order the amount found due or the amount of the loss so occasioned to be paid by the receiver into Court or otherwise within a period to be fixed by the Court. All parties to the suit or proceeding and the receiver shall be made parties to any such inquiry . . ."

Then follows a proviso which says :

" Provided that the Court may, where the account is disputed by the parties and is of a complicated nature or where it is alleged that loss has been occasioned to the property by the wilful default or gross negligence of the receiver, refer the parties to a suit. In all such cases the Court shall state in writing its reasons for the reference."

An examination of the application filed by the present respondents shows that in fact what is alleged against the receiver is fraudulent conversion. There are, it is true, numerous allegations as well involving pure questions of accounts. But the basis of the application is that the receiver has been guilty of deliberate fraud and misappropriation. It is alleged that he has acted *mala fide*, dishonestly and fraudulently. In Charge No. II there is a serious allegation that he was taking advantage of the fact that certain co-widows who were not acquainted with business transactions were concerned and deliberately manipulated the accounts taking advantage of that fact. Throughout there are allegations of fraud and in one case of " double fraud." There can be no doubt, as I have already stated, that the main allegation was that the receiver had been guilty of fraudulent conduct and misappropriation.

The learned Judge does not seem to have applied his mind to this part of the case at all. He, it is true, considered whether there were allegations of wilful default or gross negligence ; but the question whether either of these two elements was seriously concerned does not seem to have been in his mind. He thought it was to the advantage of the parties not to have this matter referred to a suit, but he does not consider whether the accounts were of a complicated nature or whether they were disputed. He seems to think that the objection by the receiver to having this

matter dealt with in a summary manner was most unreasonable. Finally, he made the following order :

" That the enquiry into the charges levelled by the petitioners against the first respondent receiver be made by a Commissioner to be appointed."

Whether the learned Judge should have made the enquiry himself is a matter which we will consider ; but this order referring so serious a matter to a Commissioner is wrong beyond dispute. A Bench of this High Court in *Manicka Mudaliar* v. *Andalammal*[1], has condemned such a course.

The only question which remains is whether the enquiry should have been made by the learned Judge himself. Order 40, in my view contemplates an enquiry in cases of ordinary questions of accounts and also cases of wilful default or gross negligence ; but it is not in my opinion designed to cover what in substance is a case of conversion. Where that is the case however, can it be doubted that, when petitions in such matters come before the Court and reveal such allegations as are set out in this petition, the inevitable course would be that reference should be made to a suit ? The decisions to which we have been referred of the Calcutta High Court *Subal Chandra Kar* v. *Jatindranath Mohan Ghose*[2], *Coomar Satya Sankar* v. *Ranee Golapmonee Debi*[3] and *Suresh Chandra* v. *A. K. M. Enamel*[4], deal with what is the practice of the Calcutta High Court in cases where there are allegations of wilful default. Wilful default is far removed from deliberate fraud. I think therefore that the learned Judge has never applied his mind to the principles which should have guided him in using his discretion in this case. In my view the case as presented by the respondents was suitable for a suit and for no other procedure and wholly unsuitable for the form of enquiry which would be made by the procedure which the Court has adopted. I need hardly repeat that enquiry and report by a Commissioner in charges of fraud against an officer of the Court is wholly illegal.

In the result, I think, that the judgment of this Court should be substituted for the judgment of the lower Court, and the order in my opinion should be that the respondents with regard to their charges against the appellant and an investigation of their mutual relations should be referred to a suit. Therefore I would allow the appeal with costs here and below. In assessing the costs the taxing authority will take into account the costs of private printing.

*Bell, J.*—I agree and would only add that in my opinion what the Court has to consider in an application made under Order 40, rule 4 (2) is (*a*) whether it is alleged that money is due as shown by the receiver's accounts and/or (*b*) whether there is an allegation of loss occasioned by the receiver's wilful default, or gross negligence. If either of these two conditions are present, then the Court may consider what powers it has. So far as the accounts are concerned, it may send them to be scrutinised and reported on by a commissioner in order to save the time of the Court. With regard to wilful default, considering the definition, the Court may hold an enquiry, the materials for which may be scrutinised in the first instance by some outside person. The Court has the further power that where the accounts are disputed and are of a complicated nature or where loss has been occasioned by wilful default or gross negligence the parties may be referred to a suit. " Wilful default " is defined by Romer, J., as he then was in *City Equitable Fire Insurance Co., In re*[5], thus :

" An act or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence is the person guilty of wilful negligence ? In my opinion that question must be answered in the negative unless he knows that he is committing and intends to commit a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty."

So far then, the Judge may do these things. But, where there is any charge of fraud involved, then he must deal with that himself whether by an enquiry or by

1. (1940) 1 M.L.J. 356 : I.L.R. (1940) Mad. 636.
2. (1926) I.L.R. 53 Cal. 881.
3. (1900) 5 C.W.N. 223.
4. (1935) 40 C.W.N. 479.
5. (1925) 1 Ch. D. 407 at 434.

directing the parties to a suit. Otherwise, the commissioner or any person to whom he delegated any power in the matter would be exercising a function belonging only to the Judge and the greatest harm might ensue to the reputation and honour of a man innocent of any moral offence, though perhaps an inefficient and unbusinesslike receiver. Here in the order appealed against the Judge speaks over and over again of the necessity of a full enquiry. He speaks of the "findings" of the commissioner on charges made against the receiver. This can only mean that the commissioner is to enquire into and come to some conclusion upon the substance or otherwise of these charges. That is not what the law provides for. The charges are serious and numerous. The schedule of the application runs to 10½ full printed pages and the charges themselves fall under no less than 20 headings. I agree entirely that it is a case where the parties should be referred to a suit in order that these charges can be investigated and dealt with properly by the Court.

I agree therefore with the order suggested by my learned brother.

V.P.S. ——— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

S. Fazal Ellahi by his duly constituted Agent, Mahomed Siddique .. *Plaintiff**

*v.*

B. S. Ram Mohan and Co., and others .. *Defendants.*

*Sale of Goods—Bill of exchange accepted and trust receipt executed by the buyers—Legality of contract if can be questioned by buyer—Seller is entitled to a first charge over the goods or on the sale proceeds thereof.*

Where the plaintiff, a merchant, carrying on business at Calcutta despatched goods by train and the railway receipts were sent to his bankers at Calcutta with instructions to hand them over to the 1st defendant (buyer) at Madras through the local branch of the bankers, on the first defendant accepting a bill of exchange drawn by the plaintiff on the 1st defendant for the price freight, etc., payable at sixty days after sight and on the first defendant further executing a trust receipt, and the bill of exchange was accepted and the trust receipt executed by the first defendant, on the question raised by defendants 2 and 3, the trustees for the creditors of the 1st defendant whether the plaintiff (seller) is entitled to a first charge over the assets in their hands,

*Held*, that except as against the assignee in bankruptcy or against transferees for value, the contract is valid as between the buyer and seller and the buyer cannot repudiate the contract as an illegal one on the mere ground that the object of the transaction was to prevent equality of distribution among the creditors. Defendants 2 and 3 cannot claim a higher position for themselves even though they are the trustees for the general body of creditors.

In re *Sumermull Surana*, (1931) I.L.R. 59 Cal. 818 and I. P. No. 142 of 1939 (Madras) followed.

Where a debtor transfers property to one creditor with a view to give a fraudulent preference to that creditor over others, there is nothing illegal though in the event of bankruptcy supervening, the transaction would be invalid as against the assignee in bankruptcy.

*Nripendra Kumar Bose*, In re, (1929) I.L.R. 56 Cal. 1074, *Chartered Bank of India, Australia and China* v. *Imperial Bank of India*, (1929) I.L.R. 60 Cal. 262, referred to.

*C. Venugopalachari* for *P. P. Selvarajan* and *T. T. Srinivasan* for Plaintiff.

*C. Srinivasachari* and *P. K. Janakiram* for Defendants.

The Court delivered the following

JUDGMENT.—The suit is for recovery of a sum of money being the balance of purchase money due in respect of goods sold by the plaintiff to the first defendant firm.

The first defendant firm executed a deed of trust for the benefit of its creditors constituting defendants 2 and 3 as the trustees. The first defendant is *ex parte*. Defendants 2 and 3 do not dispute the amount claimed but deny the plaintiff's claim to recover the suit amount by way of a first charge over the assets in their hands. The plaintiff claims a first charge under these circumstances. The contract under which the goods (hides and skins) were sold to the first defendant is not disputed. The plaintiff who is a merchant carrying on business at Calcutta despatched goods by train. The railway receipts were sent to the National Bank of India, Calcutta with instructions to hand them over to the first defendant at Madras

* C. S. No. 208 of 1943. 25th January, 1944.

through the local branch of the National Bank of India on the first defendant accepting a bill of exchange drawn by the plaintiff on the first defendant for the price, freight, etc., payable at sixty days after sight, and on the first defendant further executing what is called a trust receipt. Several sales were effected by the plaintiff on this basis and we are now concerned with the sale which was effected on the 16th December, 1941. The price was Rs. 8,951-9-0 and in respect of the price, freight, etc., a bill of exchange was drawn on the first defendant for the said sum. The bill of exchange was accepted by the first defendant and handed over to the Madras branch of the National Bank of India along with a trust receipt executed by the first defendant in favour of the National Bank. The railway receipts and the other documents in respect of this consignment were handed over to the first defendant. The bill of exchange was not honoured on the due date. Later on some payments were made and the suit is for the balance due. The plaintiff claims that the National Bank of India was only an agent for collection and that they are entitled to the benefit of the trust receipt. It is alleged that under the trust receipt, the plaintiffs are entitled to a first charge over the goods so long as they are unsold by the first defendant and after their sale by the first defendant on the sale proceeds thereof.

Defendants 2 and 3 who are the trustees for the creditors of the first defendant have no objection to the plaintiffs claiming rateably with the other creditors as unsecured creditors, but they deny the claim of the plaintiff to a first charge over the assets in their hands. The assets consist of certain goods and some sums of money of which they obtained possession. As regards the trust receipt these defendants set up that it is invalid for the various reasons which will be adverted to later.

Thus the only issue which falls to be decided is whether the plaintiff is entitled to a first charge over the assets of the first defendant in the hands of defendants 2 and 3. Ex. P-1 is the trust receipt executed by the first defendant in favour of the National Bank. It was faintly urged that the plaintiff is not entitled to sue upon it, but the plaint allegation is that the National Bank of India took the documents in question for the plaintiff's benefit and this is supported by the documentary evidence in the case. It does not really matter so far as defendants 2 and 3 are concerned whether the plaintiff is entitled to a charge or the National Bank of India. The main question which was fought out during the arguments was whether the trust receipt is invalid and ineffective to create a charge.

No oral evidence was adduced on either side and the question has to be decided on the documents. Ex. P-1 is the trust receipt executed by the first defendant before taking delivery of the consignment in question and Ex. P-2 is the bill of exchange for Rs. 8,951-9-0 being the value of the goods sold together with the incidental charges. The bill of exchange was accepted by the first defendant. The material portion of the trust receipt which is addressed to the manager of the National Bank of India, Limited, Madras is as follows :

"In consideration of your handing over to us the shipping documents of the goods as per particulars at the foot of this receipt held by your bank, as security for payment of the bill drawn by S. Fazal Ellahi on us dated 16th December, 1941, for Rs. 8,951-9-0 (Ex. P-2) being the invoice value of the said goods payable to your bank, we hereby undertake to land, store and hold the said goods until sale, and to sell the said goods as the Agents and Trustees of your bank and that until sale the said goods and after sale the proceeds thereof shall be held as and shall remain the property of your bank . . . . we undertake that the proceeds of the said goods shall in all things be treated by us in our books as belonging to your bank and ear-marked as the bank's property until the abovementioned acceptance shall be fully paid and satisfied by us.

2. We further undertake that all sales by us of the said goods shall be either for cash to be received and paid over to you . . . . as above provided for . . . and we also undertake at any time to hand over to you on demand all goods covered by this Trust Receipt for the time being unsold and authorise you or any one authorised by you in writing in that behalf to enter our godowns and take possession of the said goods at any time.

* * * * * *

4. We also undertake at all times to keep the goods covered by this Trust Receipt insured against fire to their full value and to hand over to you on receipt all moneys received from the Insurers under the policy or policies effected by us, such policy or policies being in the meantime held by us as Trustees for your bank and to be transferred to you at any time on demand.

5. We acknowledge and declare that the goods covered by this Trust Receipt and the monies from time to time outstanding in respect thereof represent a separate transaction distinct from all goods held under similar Trust Receipts or monies outstanding in respect thereof and that the aggregate of such goods and monies shall not be deemed or taken to constitute a general credit from your Bank to us.

6. On the payment by us of the full amount of the above acceptance this Trust Receipt shall be delivered up to us cancelled and thereupon any goods covered thereby which may be unsold or any proceeds thereof which shall be outstanding or unrealised shall be our absolute property."

The effect of such trust receipts has come up before the Courts very often in bankruptcy proceedings where goods are held under such trust receipts or delivered over under such receipts and the person to whom the goods are so delivered is adjudged a bankrupt, and it has been invariably held that the Official Assignee is entitled to take possession of the goods and to administer them for the benefit of all the creditors under the order and disposition clause enacted in section 52 of the Presidency Towns Insolvency Act. As against the assignee in bankruptcy the seller cannot assert his rights. The true position governing such cases was discussed by Ameer Ali, J., in In re *Sumermull Surana*[1], and in a case arising in the Insolvency Side of this Court in Application No. 1 of 1940 (I. P. No. 142 of 1939), this Court adopted the view laid down by Ameer Ali, J., in the above case. The trust receipt which came up for consideration in the Calcutta case is set out in pages 819 and 820 and is very similar to the one which I have to consider. The only difference is that in that case the trust receipts were executed in favour of the sellers direct and in this case they were executed in favour of the National Bank of India, but it is clear that in taking the trust receipts in their name the National Bank of India were acting for and on behalf of the plaintiff. On page 821 the learned Judge says this :

"The exigencies of trade apparently require that buyers should be given possession and control of goods for the purpose of sale before payment. This has led to the adoption by the sellers of various devices designed to maintain some connection with or control over the goods ; some invisible machinery by which the sellers can prevent goods being dealt with or passing from their buyer to the sellers' detriment. Two kinds of situations arise, one as between sellers and buyer simply, and the other as between sellers, bank and buyer."

In the present case the question is as between the sellers and the buyer, the bank being only the nominee of the seller. The learned Judge proceeds to state this :

"The situation to be considered here is between buyer and seller simply, but, in my opinion, the same principles apply to the situation as between bank and buyer.

As between the seller and buyer, the seller has three classes of difficulties to face,

(1) vis-a-vis the buyer, (2) vis-a-vis the transferees, or (3) vis-a-vis the Official Assignee

* * * *

(1) As against the buyer, whether the property passes or not, whether or not the seller has lost his lien, he yet has, whatever form of document he takes from the buyer, a valid contract and the buyer is bound by that contract and in proper proceedings the seller can enforce his rights, possibly by injunction, possibly by receiver, but, in any event, he has a remedy. The real difficulty is against third parties and the Official Assignee . . . . ."

After referring to the various devices to which the sellers of goods resort in order to prevent the property in the goods sold vesting in the Official Assignee in cases of bankruptcy, the learned Judge points out that :

"delivery plus a document or device purporting to create fiduciary ownership on the part of the buyer, that is, trust,"

is one of the devices resorted to. After dealing with the other cases of devices, the Judge deals with the device of trust on page 823 thus :

"There remains the question of trust. As already indicated I propose to assume that the clause here (clause 34) is equivalent to a trust receipt. Now, it is clear that trust receipt may be considered something more than mere contract (see In re *David Allester, Ltd.*[2]). Sellers resorted to the device of trust for the reason that, as a general rule, trust property does not vest in the Official Assignee and is excluded from the scope of reputed ownership. That general rule is based upon the theory of law that the trustee is the owner. Therefore, there is no other owner who can give his consent to reputed ownership, by the buyer."

1. (1931) I.L.R. 59 Cal. 818. 2. (1922) 2 Ch. 211.

He winds up the discussion by pointing out on page 826, thus :

"*Secondly*, trust receipts taken by a trader seller from a trader buyer so far as they purport to create an agency for sale do not preserve the property from reputed ownership unless the relationship of the parties is known to the public. The commonsense of the matter is this, that no special words, or legal formula can preserve a control where actual control has been abandoned nor maintain a connection with the goods when the connection has been in fact severed or save for the seller, property which a seller hands over to a buyer with capacity to deal with it either as against the transferees for value or against the Official Assignee. If the exigencies of trade require that the goods must be handed over for sale the seller takes the risk, he cannot put that risk upon the public which deals with his buyer ostensibly in possession of those goods as owner.".

From this discussion it is clear that except as against the assignee in bankruptcy or against transferees for value the contract is valid as between the buyer and seller and the buyer cannot repudiate the contract as an illegal one. Defendants 2 and 3 cannot claim a higher position for themselves though they are trustees for the general body of the creditors. There being no adjudication, the doctrine of reputed ownership does not come in and there is no reason to hold that defendants 2 and 3 are not bound by the terms of Ex. E-1.

The argument of Mr. Srinivasachari, the learned advocate for defendants 2 and 3, is that if permitted, such a contract would defeat the provisions of the bankruptcy law which provides for equal distribution of a debtor's goods among all the creditors. Section 23 of the Indian Contract Act is relied upon by Mr. Srinivasachari and the material portion relevant to the point under discussion runs thus :

"The consideration or object of an agreement is lawful unless it is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent."

In the case of *Nripendrakumar Bose*, In re[1], the question arose in the Insolvency Court after adjudication of the buyer. The actual question for decision was whether the property in the goods vested in the Official Assignee after bankruptcy. The learned Judge referred to section 52 (1) (*a*) and to section 52 (2) (*c*) of the Presidency Towns Insolvency Act and stated thus on page 1078 :

"If therefore, the property in the goods never passed to Bose, in my opinion, it is clear upon the facts that the goods were in his reputed ownership within the meaning of section 52 (2) (*c*).

On sale of goods, the property in the goods passes, when the parties intend that it shall pass, as shown by the terms of the contract, and the circumstances of the case.

Where the delivery of the goods or of a document giving control of the goods is to be in exchange for payment of, or security for the price of the goods, the seller, unless a contrary intention appears, reserves the right of disposal and the property in the goods, until payment, or security, be made or given accordingly. In the absence, therefore, of the trust receipt, the property in these goods would have passed to Bose on signing the pronote and not before. But the effect of the trust receipt was to postpone the transfer of property until payment. Apart, however, from these considerations, the arrangement made by the petitioners was only an ingenious attempt to defeat the provisions of the Insolvency Act. While putting it in the power of Bose to obtain credit on the strength of the goods with which they supplied him, they tried nevertheless to secure a preference for themselves over all other creditors. Even if they had succeeded in drafting a document, which would have been sufficient to create a trust, in my opinion such a trust would not have been legal or valid. A trust must be created in good faith."

The same Judge (*Lort Williams, J.*) in *Chartered Bank of India, Australia and China* v. *Imperial Bank of India*[2], agreed with the view expressed by Ameer Ali, J., in In re *Sumermull Surana*[3], and re-stated his view thus on page 273 :

"So far as the present case is concerned the question can be disposed of shortly ;

Whatever be the relation created as between the plaintiffs and Kerr Tarruck and Co., whether the trust receipts created contracts of agency or something more, such as a trust, they cannot affect the defendants, who had no knowledge of them, and who, *bona fide*, had given valuable consideration for the goods pledged . . . It seems to me clear that Kerr Tarruck and Co., were in possession of the goods within the meaning of the old section 178 of the Indian Contract Act, and could and did make a valid pledge of them to the defendants apart from any question arising under the terms of the second proviso."

The above case was as between the seller of goods and a person who advanced money to the buyer on a pledge of those goods. Kerr Tarruck and Co., were the buyers and they obtained the goods on executing trust receipts in favour of the

1. (1929) I.L.R. 56 Cal. 1074. 2. (1929) I.L.R. 60 Cal. 262.
3. (1931) I.L.R. 59 Cal. 818.

plaintiff-bank. They later on pledged them with the defendant Bank who received the goods in good faith as belonging to the importers without any knowledge of the trust receipts and allowed overdraft on the security of the pledged goods. The question was whether the plaintiffs' claim prevailed over the right of the defendants as pledgees of the goods. It was sufficient for the learned Judge to dispose of the case to rely as he did on section 178 of the Indian Contract Act and indeed this is the second case formulated by Ameer Ali, J., in the case of In re *Sumermull Surana*[1] After pointing out that section 178 of the Indian Contract Act enabled the importers Kerr Tarruck and Co., to make a valid pledge to the defendants, Lort Williams, J., went on to say that no trust was or could be made by means of the trust receipt. He stated his view thus :

> " The real object of such documents as trust receipts, in this as in many other cases, seems to be, to try and defeat the provisions of section 52 (2) (*c*) of the Presidency Towns Insolvency Act, and this Mr. Warwick was finally constrained to admit was the real object of the plaintiffs in issuing them . . . . . In any case, such would be the effect if permitted. This would offend against the provisions of section 4 of the Indian Trusts Act, as also would the involved breach of contract between the Chartered Bank and the shippers."

Mr. Srinivasachari , the learned advocate for defendants 2 and 3, urges that the view propounded by Lort-Williams, J., in the two cases is to be accepted. But in both the cases the real ground of decision was not that the contract was illegal. In the first case, bankruptcy had supervened and the question was against the assignee in bankruptcy. The learned Judge held that under section 52, clause (2) (*c*), (order and disposition clause) of the Presidency Towns Insolvency Act, the goods vested in the Official Assignee. In the latter case the defendants were *bona fide* pledgees who advanced moneys without notice of the trust receipts and section 178 of the Indian Contract Act was invoked. From the mere fact that a fraudulent preference was intended in favour of certain persons, it does not follow that a contract or disposition of property is not valid as between the parties to the contract. As has been pointed out by the Judicial Committee in *Minakumari Bibi v. Bijoy Singh Dhudhuria*[2], where a debtor transfers property to one creditor with a view to give a fraudulent preference to that creditor over others, there is nothing illegal though in the event of bankruptcy supervening, the transaction would be invalid as against the assignee in bankruptcy. There the object of the transaction is obviously one to defeat the provisions of bankruptcy law which requires equal distribution among all the creditors and yet though the object of the alienation is to defeat this equality of distribution, and though it would be avoided in the event of a bankruptcy, it is clear that as between the parties to the contract they are bound by it. I therefore hold that the mere fact that the object of the transaction is to prevent equality of distribution among the creditors, it is not a ground for holding that the contract itself is illegal or that it is not binding upon the seller or upon voluntary transferees from him. No decision has been brought to my notice laying down that such a transaction is illegal as between the parties to the suit except the observations of Lort-Williams, J., in the two cases above cited. If the transaction is binding on the first defendant, as I hold it is, there was no suggestion that it is not binding on defendants 2 and 3. The whole argument was directed to show that it was not binding against the first defendant.

The defendants urge that the first defendant became the owner the moment that he accepted the bill of exchange, that the execution of the trust receipt amounts only to a pledge and that the pledge is invalid as the goods were in pledgor's possession. If this is the true position, there is the authority of the House of Lords in *North Western Bank* v. *Poynter, Son and Macdonalds*[3], that the transaction is good as between the parties to the transaction. A pawnee may re-deliver the goods to the pawnor for a limited purpose without thereby losing his rights under the contract of pledge as for the purpose of enabling the pledgor to sell the goods on the pledgee's behalf—See also Pollock and Mulla's Contract Act, page 544, sixth edition.

1. (1931) I.L.R. 59 Cal. 818.
2. (1916) 32 M.L.J. 425 : L.R. 44 I.A. 72 : I.L.R. 44 Cal. 662 (P.C.).
3. (1895) A.C. 56.

The plaintiff will have a decree as prayed for with costs against the first defendant and against the assets of the first defendant in the hands of the second and third defendants. Defendants 2 and 3 may take their costs out of the first defendant's estate in their hands.

V.P.S. ——— *Suit decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Marwadi Sumermal Jamatraj Firm by Partner, Jamatraj .. *Appellant**

*v.*

Bandade Thukkappa *alias* Thukkappa (died) and another .. *Respondents.*

*Specific Relief Act (I of 1877), section 27—Applicability—Agreement to sell followed by a sale to a different party—No notice to subsequent transferee till execution of sale deed—Portion of the consideration adjusted towards outstanding debt and balance only paid in cash—Transferee has 'paid his money'—Agreement to sell unenforceable against transferee.*

The owners of a certain property agreed to convey it to the plaintiff and part of the consideration was paid. But they subsequently conveyed it to the defendant who had notice of the prior agreement to sell only after the execution of the sale deed in his favour but prior to its registration. Portion of the consideration for the sale was adjusted towards an outstanding debt and the balance only was paid in cash. On a question whether the prior agreement to sell was enforceable,

*Held*: Section 27 of the Specific Relief Act protects a transferee who has 'paid his money.' The transferee by paying the balance in cash after adjusting the amount due under the outstanding debt had thereby paid to the transferor all that had to be paid under the contract of sale and could therefore be literally said to have 'paid his money'. The facts of the case attracted section 27 of the Specific Relief Act and rendered the suit contract unenforceable against the transferee.

Appeal against the decree of the District Court of Bellary in A. S. No. 71 of 1941, preferred against the decree of the Court of the District Munsiff of Hospet in O. S. No. 624 of 1939.

*V. S. Narasimhachar* for Appellant.

*Kasturi Seshagiri Rao* for Respondents.

The Court delivered the following

JUDGMENT.—By Exs. A and C, dated 29th April, 1939, and 9th May, 1939, respectively, the owners of a certain property agreed to convey it to the appellant, and part of the consideration was paid. On 3rd June, 1939, however, the owners conveyed the property by Ex. V to the defendant. The findings of fact of the Courts below are that subsequent to the execution of the sale deed, Ex. V, but prior to the date of registration, 12th July, 1939, the defendant had notice of the prior agreement in favour of the appellant. The question is whether in the circumstances the appellant (plaintiff) is entitled to enforce the contract of sale against either the original owners or the defendant. Both the lower Courts held that he could not.

It is complained against the judgments of the Courts below that the trial Court wrongly threw the onus on the plaintiff. It is, however, conceded that the learned District Judge in appeal held that the burden lay on the defendant of proving that he was a transferee for value who had paid his money in good faith and without notice of the original contract. The appellant, however, complains that although the learned District Judge rightly placed the onus on the defendant, he closely followed the reasoning of the trial Court and went as far as to include in his own judgment an extensive passage from the judgment of the first Court. That may be so; but I do not think the learned District Judge ever forgot to exercise his independent judgment or lost sight of the fact that the onus lay upon the defendant. It is always very difficult, and at times well nigh impossible, to prove a negative. So the learned Judge has paid more attention to the positive acts of the plaintiff than to the bare denial of the defendant.

* S. A. No. 158 of 1943. 15th February 1944.

No authority has been cited in support of the appellant's contention that if the vendee had notice of the agreement before the registration was completed, the plaintiff is entitled to enforce his agreement against the transferee. In order that section 27 of the Specific Relief Act, may be invoked notice has to be given before the money is paid. That is clearly the view taken in *Himatlal Motilal* v. *Vasudev Ganesh*[1], where the question arose whether the person in whose favour an agreement had been executed was entitled to enforce his agreement against the transferee, where the transferee had paid a part of the consideration and not the whole. The learned Judges held that the law in India was the same as in England on this point and that he could do so provided that the whole of the consideration had not been paid. The learned advocate for the appellant, placing reliance on the words actually used by the learned Judges in that case, argues that the defendant cannot avail himself of section 27, because a part of the consideration was an adjustment of an amount due under a prior mortgage and was not therefore paid in cash. In *Gudur Ranga Reddi* v. *Gundala Pichi Reddi*[2], the learned Judges held that where the sale consideration was an adjustment of a prior debt, the transferee was not protected by section 27 of the Specific Relief Act. They said :

> "We are of opinion that the recital in Ex. II does not operate as an adjustment so as to put the appellant in the same position as a man who had 'paid his money in good faith' within the meaning of Sec. 27 of the Specific Relief Act."

This section protects a transferee who has "paid his money." If he has not paid any money, then it is rather difficult to literally apply this section. If he has not paid the whole of the consideration, as in *Himatlal Motilal* v. *Vasudev Ganesh*[1], it again cannot be said that he has paid his money : for he has paid only a part of it. Where, however, a portion of the consideration was in adjustment of an outstanding debt and the remainder was paid in cash, the transferee thereby paid to the transferor all that had to be paid under the contract and can therefore literally be said to have "paid his money." The facts of this case therefore attract section 27 and render the suit contract unenforceable against the respondent.

The appeal fails and is dismissed with costs.

V.S. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT AND MR. JUSTICE BELL.

Bharpat Mohammad Haneef Sahib and others .. *Appellants**

*v.*

The Board of Trustees, Jumma Masjid, Adoni, represented by the Executive Trustee, Haji S. Abdul Kareem Sahib and another. *Respondents.*

*Civil Procedure Code (V of 1908), section 92—Application to change scheme substantially by means of alterations and additions—Clause in the scheme permitting such application—*Ultra vires *as it offends section 92.*

Where in a scheme that was settled for the administration of a mosque there is a clause permitting the plaintiffs or the Board of Trustees or twenty Mohammadans interested in the mosque to apply by way of a petition to the Court for such further directions or alteration or modification of the scheme as may be necessary and the petitioners took out an application to change the scheme substantially by means of alterations and additions, on the question whether the clause is *ultra vires*,

*Held*, that the clause is *ultra vires* as offending section 92 of the Civil Procedure Code.

*Veeraraghavachariar* v. *Advocate-General, Madras*, (1927) 53 M.L.J. 792 : I.L.R. 51 Mad. 31 (F.B.), followed.

*Prayag Dasji Varu* v. *Tirumala Srirangacharyulu Varu*, (1907) 17 M.L.J. 236 : L.R. 34 I.A. 78 : I.L.R. 30 Mad. 138 (P.C.), *Kirpasankar* v. *Manohar Tambakar*, (1912) 24 M.L.J. 199 (P.C.), *Vaidyalinga Mudaliar* v. *Board of Control, Sri Thyagarajaswami Devasthanam, Tiruvarur*, (1936) 71 M.L.J. 87: I.L.R. 59 Mad. 751, referred to.

*Govindaswami Naidu* v. *Kannuswami Chetti*, (1939) M.W.N. 1009, distinguished.

Appeal against the order of the District Court of Bellary dated 6th August, 1942, and made in I. A. No. 363 of 1941 in O. S. No. 43 of 1920, on the file of the Court of the Subordinate Judge of Bellary.

1. (1912) I.L.R. 36 Bom. 446.
2. (1914) 1 L.W. 879.

* A. A. O. No. 576 of 1942. 3rd February, 1944.

*Basheer Ahmed Sayeed*, for Appellants.

*A. Bhujanga Rao* and *D. R. Krishna Rao* for Respondents.

The Judgment of the Court was delivered by

*Mockett, J.*—This appeal concerns the mosque Jamma Masjid at Adoni. The appellants are twenty Adoni Muslims. The respondents are the trustees who owe their existence to a scheme which was settled in 1920 in O. S. No. 43 of 1920. That scheme contains clause 22, which reads as follows :

" Any of the plaintiffs or the Board of Trustees or twenty Mohammadans of Adoni interested in the mosque may by petition apply to the Court for such further directions or alteration or modification of the scheme as may be necessary. The Court may after publication of notice in such manner as it deems proper hear the petitioners and any persons that may appear after such notice or their pleaders and pass such orders as it thinks necessary in the circumstances of the case."

The learned District Judge of Bellary dismissed the application on the ground that it offended against section 92, Civil Procedure Code. The law on the subject had been set at rest by the decision of the Full Bench of this Court reported in *Veeraraghavachariar* v. *Advocate-General, Madras*[1]. The headnote which appears accurately to represent the judgment is as follows :

" If in a decree for a scheme framed under section 92, Civil Procedure Code, liberty is given to persons to apply to the Court for directions merely to carry out the scheme already settled, such reservation of liberty in the decree will be *intra vires* if the assistance of the Court can be given without offending section 92 ; but where liberty is given to apply to the Court for alteration or modification of the scheme, such reservation is *ultra vires* as offending section 92."

The attention of the Full Bench was drawn to the fact that in two cases *Prayag Dasji Varu* v. *Tirumala Srirangacharyulu Varu*[2], *Kirpasankar* v. *Manohar Tambakar*[3], the Privy Council had apparently sanctioned schemes which contained clauses somewhat similar to rule 22 of the scheme before us. The Full Bench pointed out that never at any time was the attention of their Lordships invited to the point which arose before the Full Bench, namely, whether such clauses were *ultra vires*, or *intra vires*. The same comment can be made with regard to a later decision of the Privy Council in *Satischandra Giri* v. *Dharanidhar Singh Roy*[4], where a similar clause is not the subject of comment. It is worthy of note that the decision of the Madras Full Bench in *Viraraghavachariar* v. *Advocate-General, Madras*[1], was not mentioned before their Lordships.

The question that arises in this case which has been dealt with at length by the learned District Judge is whether these proposals which were before him offended against the rule as laid down by the Full Bench. They are headed " modifications proposed." They have been subjected to a careful analysis by the learned District Judge who has divided them into two groups and he takes the view that they all are modifications, alterations or additions and that not one of them can be said to be an application for directions for the purpose of carrying out the scheme already settled. We do not propose to follow the learned Judge throughout his analysis with which however we are in agreement. One or two examples are enough. There are certain striking changes, for instance, in rule 2 a period of five years is to be altered to three years. In rule 3, the subscription of four annas is to be reduced to two annas and the qualification of an elector is to be raised from a subscription of not less than one rupee to ten rupees. Additions are to be made to rule 3 with regard to the publication of the preliminary electoral roll. In rule 8 a very important change is proposed. It originally read thus : " The office of the executive trusteeship shall go by rotation." It is sought to be altered to " election and rotation". We do not propose to go further into the learned Judge's analysis. It is enough to conclude with this : that there is a prayer for directing the accounts to be taken from 1931-32 upto date, that is, upto 1942, which palpably offends against section 92 (*d*) of the Civil Procedure Code. The learned Judge has therefore quite rightly held

1. (1927) 53 M.L.J. 792 : I.L.R. 51 Mad. 31 (F.B.).
2. (1907) 17 M.L.J. 236 : L.R. 34 I.A. 78 : I.L.R. 30 Mad. 138 (P.C.).
3. (1912) 24 M.L.J. 199 (P.C.).
4. (1940) 1 M.L.J. 371 : L.R. 67 I. A. 32 : I.L.R. (1940) 1 Cal. 266 (P.C.)

that the whole of the application in the Court below is an attempt to change the scheme substantially by means of alterations and additions. In other words, it offends against the rule laid down by the Full Bench in *Veeraraghavachariar* v. *Advocate-General, Madras*[1], Mr. Basheer Ahmed who has argued this case before us has left nothing unsaid that can be said. He has asked us to say that it was time that the decision of the Full Bench should be reconsidered in view of the decisions of other High Courts, for example, *Srijib Nyayathirtha* v. *Dandy Swami Jagannadha Ashram.*[2] There are no decisions of this High Court which in any way suggest that the view taken by the Full Bench in *Veeraraghavachariar* v. *Advocate-General, Madras*[1] requires consideration. It has been followed in several cases. It may be unfortunate that parties are driven to the cumbrous procedure of suits in these matters, but that appears to be the law and apparently the considered law.

There was however one decision to which our attention was drawn , the decision of Venkataramana Rao, J., reported in *Govindaswami Naidu* v. *Kannuswami Chetti*[3] In that case the scheme provided for the election of trustees and the learned Judge held it was open to a worshipper or voter to apply to the Court for the issue of a direction to the trustee to remove the name of a person from the list of candidates. The learned Judge took the view that this was merely a direction for the carrying out of the scheme. It does not appear that the decision of Venkatasubba Rao, and Cornish, JJ., in *Vaidyalinga Mudaliar* v. *Board of Control, Sri Thyagarajaswami Devasthanam, Tiruvarur*[4] was brought to the notice of the learned Judge, especially the observations of Cornish, J., and we do not think that that case can be held to be an authority apart from the special facts on which it was decided.

We would add that the learned counsel for the respondents took the point that an appeal did not lie in this case. We do not think it necessary to decide this as we dismiss the appeal on the merits. In the result, the appeal is dismissed with costs.

V.P.S. *Appeal dismissed.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Subban Samban .. *Petitioner**

*Penal Code (XLV of 1860), section 211—Gist of offence under—Gangman in railway company reporting to station master about alleged removal of keys on the line—Report found to be false—Gangman if can be convicted of offence under section 211, of the Penal Code.*

The petitioner was a gangman employed in the South Indian Railway Company. He noticed a person removing two keys on the railway line. He caught hold of him but he ran away. The gangman picked the two keys and handed them over to the station master and gave a report to him. But it was clear that he gave such information only for the purpose of giving information as regards the state of the railway line. On a complaint against the gangman for an offence under section 211 of the Indian Penal Code,

*Held,* that the station master was not a person entitled to investigate the crime. The information was not given with intent to set the criminal law in motion but in the discharge of his duties as gangman to give such information about the line to the station master. Accordingly the gangman cannot be convicted for the offence punishable under section 211 of the Indian Penal Code by reason of his having given the report even though what was stated there was false.

In the matter of the petition of *Jamoona,* (1881) I.L.R. 6 Cal. 620 relied on.

*The Sessions Judge of Tinnevelly Division* v. *Sivan Chetty,* (1909) I.L.R. 32 Mad. 258, considered.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Additional First Class Magistrate, Dindigul, dated 17th May, 1943, and passed in C. C. No. 64 of 1943.

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1. (1927) 53 M.L.J. 792 : I.L.R. 51 Mad. 31 (F.B.).
2. A.I.R. 1941 Cal. 618.
3. 1939 M.W.N. 1009.
4. (1936) 71 M.L.J. 87 : I. L. R. 59 Mad. 751.

* Cr. R. C. 468 of 1943.
(Cr. R. P. No. 425 of 1943).

2nd December, 1943.

*T. K. Rajagopala Aiyangar*, for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The main point urged before me in this petition is that even if the accusation is false the petitioner cannot be convicted for an offence punishable under section 211, Indian Penal Code, as all that he had done in this case was to send a report to his official superior in the discharge of his duties and that he had not sent it with intent to set the criminal law in motion.

The petitioner was a gangman employed in the South Indian Railway Company. On the date of occurrence when he was returning from Mettur, he noticed a person removing two keys on the railway line. He caught hold of him but he ran away. He picked the two keys and handed them over to the station master of Ambathurai and gave a report, Ex. G. That it was done only for the purpose of giving information as regards the state of the railway line is clear from the last sentence in that report which is as follows :

> " There is no obstruction whatever in the way of the train running along the lines."

It is the duty of the gangman to watch the line and report to the authorities about its condition, so that they may take steps to prevent trains running on the line, if there be any defect. That is why he had sent a report. There is nothing in the report to indicate that the intention of the petitioner when he sent a report was that criminal proceedings should be started against any one. In a very nearly similar case, In the matter of the petition of *Jamoona*,[1] the Calcutta High Court has held that such a report not made to a police officer or to an officer who had powers of investigation in respect of such crimes, could not be said to amount to setting the criminal law in motion or making a false charge. The accused in that case was said to have made a report to the Station Staff Officer accusing a non-commissioned officer of having committed rape on her. An enquiry was made and the charge was found to be false by the military authorities and the Commanding Officer caused the appellant to be prosecuted in the Criminal Court for an offence punishable under section 211, Indian Penal Code. She was convicted and the matter was taken to the High Court and it was held that the appellant neither instituted nor caused to be instituted a criminal proceeding though it was true she charged a non-commissioned officer with an offence. As the Station Staff Officer was neither a Magistrate nor a police officer, it was held that section 211 would not apply. This case was referred to in the *Sessions Judge of Tinnevelly Division* v. *Sivan Chetty*[2], and was not dissented from but distinguished. In the latter case information was given to the village Munsiff and it was held that it would bring the case within the purview of section 211. At page 264 there is the following observation :

> " But if a man made a complaint to one of the other persons having a legal obligation under that section to report to the police or Magistrate and did this with the intention of setting the criminal law in motion, we think that he would come not only within the terms of the section but within the mischief which the law desired to meet."

In the present case, the station master was not a person who was entitled to investigate into the crime. The information was not given with intent to set the criminal law in motion ; but in the discharge of his duties as gangman to give such information about the line to the station-master. I therefore find that the petitioner cannot be convicted for the offence punishable under section 211, Indian Penal Code, by reason of his having given the report even though what was stated there was false. I therefore set aside the conviction and sentence and acquit the petitioner. The fine, if already collected, will be refunded.

K.S. ——— *Petition allowed.*

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1. (1881) I.L.R. 6 Cal. 620.
2. (1909) I.L.R. 32 Mad. 258.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT AND MR. JUSTICE BELL.

Chintakayala Ramayya and others .. *Appellants**

*v.*

Mithinti Lakshmayya and others .. *Respondents.*

*Civil Procedure Code (V of 1908), Order 43, rule 1* (d)—*Applicability*—Ex parte *decrees—Order directing deposit of costs of other side as a condition precedent to restoration of suit and in default petition to stand dismissed —Subsequent order on adjourned date declaring that decrees stand as the order regarding deposit had not been complied with—Prior order final and appealable.*

On applications to set aside certain *ex parte* decrees passed against the applicants it was ordered that the petitioners do pay Rs. 100 for costs of the respondents irrespective of the result in the suits within 15 days from the date of the order and shall also deposit costs of the suits as a condition precedent before the trial of the suits which were thereby restored to file and posted peremptorily to the 26th July, 1943. In default, the petitions were to stand dismissed with costs. The costs were not deposited and on the 26th July, the following order was passed "As the direction given in the order on the said petitions is not obeyed, the order operates and the decrees passed already stand."

On a question as to whether an appeal lies under Order 43, rule 1 (*d*) against the first order,

*Held*, that the first order was the only order in the case and was appealable. That order was all comprehensive. The second order was nothing more than the recording of the legal position, which had arisen from the non-fulfilment of a condition precedent by the petitioners. It was not any further order because, no further order was required in the case. There was no such thing in this case as a conditional order and a final order. There was only one order which was the final order.

Appeals against the orders of the Court of the Subordinate Judge of Guntur, dated 5th July, 1943, and made in I. A. Nos. 568, 569 and 570 of 1943 respectively in O. S. Nos. 58, 82 and 83 of 1942.

*T. S. Rama Rao* for Appellants.

*P. Satyanarayana Rao* for Respondents.

The Court delivered the following

JUDGMENTS : *Mockett, J.*—In this appeal, Mr. Satyanarayana Rao has raised a preliminary point that no appeal lies. The facts are as follows :

The appellants were defendants 2 to 14 in three suits—O. S. Nos. 58, 82 and 83 of 1943. There is no appeal by the first defendant. Before suits, attachments before judgment of substantially all the debtors' properties were effected. On the 21st of March, 1943, the defendants' vakil left hurriedly for Benares to be present with his son, who was stated to be sick with small-pox. On the 22nd March, it is said that an oral request was made by the third defendant for an adjournment. On the 25th March, I. A. No. 528 of 1943 was filed—an application to adjourn the case to April 5th, which was dismissed ; and on that day, *ex parte* decrees were passed in the three suits. On the 2nd April, 1943, I. A. Nos. 568, 569 and 570 were filed praying to set aside the three *ex parte* decrees. On the 5th July, 1943, an order was passed and in the judgment, the learned Judge said :

" On the whole I should think that the suits should be restored and sufficient costs should be awarded to the respondents as a panacea as was done by His Lordship in the case quoted above *Venkateswara Rao* v. *Subramaniam.*[1] I therefore order the petitioner to pay Rs. 100 for costs of the respondents irrespective of the result in the suits within 15 days from this date. They shall also deposit costs of the suits as a condition precedent before the trial of the suits which are hereby restored to file and posted peremptorily to the 26th July, 1943. In default, the petitions will stand dismissed with costs."

The decretal order on that judgment was :

" It is ordered that the petition be and the same is hereby allowed. It is further ordered that the petitioners do deposit into Court a sum of Rs. 100 towards their costs in this petition and also in I.A. Nos. 569, 570 and 625 to 627 of 1943 irrespective of the result of the suits and do also deposit the costs decreed on or before the 26th July, 1943. It is further ordered that in default of payment the petitions do stand dismissed with costs."

I. A. Nos. 625 to 627 of 1943 related to the first defendant and we are not concerned with them in any way. There were certain further proceedings by the appellants

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* A. A. O. Nos. 334 to 336 of 1943. 2nd March, 1944.

1. (1939) 2 M.L.J. 611.

with which we are not concerned. It is enough to say that they claim that they were quite unable to comply with the order of the 5th July, and have made attempts in the High Court to improve their position. An order for stay passed by the High Court reached the lower Court after the order of July 26 was passed. On the 26th July, that is to say, some days after the expiration of 15 days from the 5th July, and to which day the suits had been posted peremptorily by the learned Judge on the 5th July, 1943, the following order was passed :

"Defendants are called and they are absent. The plaintiffs are ready. The defendants have not deposited the amount ordered to be paid into Court by this date in I. A. No. 568 and 625 of 1943. As the direction given in the order on the said petitions is not obeyed, the order operates and the decrees passed already stand."

Mr. Satyanarayana Rao has argued that this is not within Order 43, rule 1 (*d*). The appeals before us, he contends, are not against orders under rule 13 or rule 15 of Order 9, rejecting an application for an order to set aside a decree or order passed *ex parte*. He contends that the order of the 5th July, 1943, so far from being an order rejecting an application is an order allowing the application and he contends that if the appellants desire to appeal at all, they should have appealed not against the order of the 5th July, but against the order of the 26th July, which was the order dismissing the application to set aside the *ex parte* decree. It has been contended by learned counsel for the appellants that this argument is fallacious, that the order of the 5th July, was complete in itself and that the order of the 26th July was not an order in relation to these applications, and did nothing more than recall what had happened with regard to the order of the 5th July, namely, that it had worked itself out and that, therefore, the decrees in the suit automatically were restored to life. His words were "The decrees passed already stand." There is no doubt that if it appears that in these applications to set aside *ex parte* decrees an order implies that a further order is required to dispose of the applications, it is that last order, if it rejects the application, which should be attacked in appeal.

The cases seem to us to be entirely clear. There are two decisions of the Madras High Court and one decision of a Full Bench of the Bombay High Court on the topic. The earliest case is of no great assistance. It is *Venkatasami Naidu* v. *Shanmugham Pillai*[1]. The precise terms of the order passed in the lower Court are unfortunately not set out; but the learned Judges Oldfield and Bakewell, JJ., held, "that the expression "rejecting an application" under Order 43, rule 1 (*d*) signifies an immediate rejection and not a conditional or prospective rejection * * *". They went on to lay down what they thought to be the appropriate procedure. In the absence of the exact terms of the order, that case is of little assistance. It must presumably have been in terms which required a second order. Madhavan Nair, J., (as he then was, sitting alone) in *Rajagopalachari* v. *Thathachariar*[2], had to deal with this position. In that case, the order was that "the *ex parte* decree will be set aside if in two weeks petitioner pays to plaintiff all costs of suit so far incurred unconditionally and further he puts the suit amount and interest decreed into Court in 14 days. If he does not pay, petition will stand dismissed with costs."

The learned Munsiff noted that the petition was to be called for final disposal on the 13th September, 1923. The matter came before the Court again and an order was passed finally dismissing the application to set aside the *ex parte* decree. It is clear that the I. As. concerned in that case were treated as open and were expressly posted for further consideration; and it appears that when they were heard, there was some discussion as to the terms. Madhavan Nair, J., rightly observes that all the parties as well as the Court treated the prior order as a conditional one. The last order was "Money not put into Court. Application rejected." The learned Judge held that it was this last order which should be made the subject of an appeal.

The order however, before us seems to be all comprehensive. What happened is this : The petitioners had to do certain things, namely, deposit costs into Court.

1. (1917) M.W.N. 815.
2. A.I.R. 1925 Mad. 1182.

If they did not do so, their petition was to stand dismissed with costs. I think that that order is exactly the type of order which is passed on the original side of the Bombay High Court and to which reference is made by the Chief Justice when delivering the judgment in the Full Bench decision of five judges in *Narayan Putappa* v. *Vaikunt Subaya*[1], who dealt with this very subject. The learned Chief Justice says at page 75 :

> " My brothers Shah and Fawcett tell me that in the mofussil it is usual to make two orders : namely, (*a*) a preliminary conditional order like that of May 30, and (*b*) a final order like that of July 18. That indeed is the practice pointed out in *Jagannath Sahi* v. *Kampte Prasad Upadhya*[2]. On the original side, the usual order provides that if the applicant does not comply with the conditions therein stated then his application is to be dismissed, and the original *ex parte* decree to stand. In other words, on the original side we usually have one order and not two as is the case here. But whichever course is adopted, in my opinion, it makes no difference in principle."

On May 30, 1925 the first order in that case was :

> " Suit to be restored to file on the applicants or any of them furnishing adequate security for Rs. 3,000 only within one month. Applicants to bear costs of this application."

and then followed on July 18, the following order :

> " As security is not furnished in spite of ample opportunity given, the application fails and suit cannot be restored to file. Application is rejected with costs."

The learned Judges held that an appeal lay against the second order. It seems to us that, as already indicated, that the form of the order in this is what the learned Chief Justice described as the " single order ". When 15 days had expired and the appellants had not complied with the terms imposed, automatically their petition was dismissed with costs and automatically the suits were restored to the file and were ready for hearing by the trial Judge.

To return for a moment to the judgment, that is exactly how the learned Judge appreciated the situation. He points out that the defendants are not there, that the plaintiffs are ready, that the defendants have not complied with the condition and that as the directions have not been obeyed, the order operates and the decrees passed already stand. It seems to be nothing more than the recording of the legal position, which had arisen from the non-fulfilment of a condition precedent by the appellants. We have perused the interlocutory applications and there was merely a reference to this judgment, which seems to be nothing more than an intimation to the clerical staff as to what had happened to them. But, in my view, no further order was passed at all and the reason, as I have indicated is that no further order was required. It must naturally be a matter of difficulty to construe such orders as this, whether they are final or whether they require a second order to complete them. I personally am glad to give a liberal construction to these matters and not by extreme technicality to shut out an appellant from being heard ; for after all that is all that he asks for. It certainly seems to me that the order of July 5 concluded the matter and I do not suppose that either the Court or the parties had any other idea in their minds. I therefore hold that as the order of the 5th July, was the one and only order in this case and as an appeal has been filed against it, the preliminary objection must fail.

I will now deal with the suit on the merits. This case is similar to another which has recently come before us for the grant of leave, where the rights to have a suit restored have been accompanied by conditions that would appear to be unreasonable, because they are impossible of achievement. The land of the defendants had been attached before judgment and they claim that by ordering the costs of the suit to be deposited as a condition precedent, which amount to a very large sum, they have been put on terms which they cannot possibly carry out. I therefore propose to substitute what I consider to be a reasonable order for the order which has been passed. The lower Court's order is set aside and instead the following order is passed : The appellants will pay to the respondents the sum of Rs. 425 altogether, which sum is made up of Rs. 100 in each of the suits and the costs of

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1. (1926) I.L.R. 51 Bom. 67 (F.B.). 2. (1913) I.L.R. 36 All. 77, 79.

these appeals which have been estimated at Rs. 125. The amount will be paid within 14 days of today, March 2. If the amount is not paid within that time then without any further order being passed, this appeal will stand dismissed, with the result that the application to restore the suits will be taken to have been dismissed and the decrees passed already will stand.

*Bell, J.*—I agree and would only add a word on the preliminary objection raised by the respondents. Where any further direction of the Court is required with regard to the matters in issue between the parties, it cannot be said that finality in any shape or form has been reached. What more on 5th July, 1943, was required from the Subordinate Judge's Court? If the last sentence of the decretal order be left out, clearly there would be something lacking that is to say, a ruling as to the effect of any default on the part of the petitioners. But this the order provided for by saying:

"It is further ordered that in default of payment the petition do stand dismissed with costs."

Nothing further was left to be said as to the final result of the petition. The petitions were not, in fact, considered on 26th July, 1943. They were never even mentioned. The Subordinate Judge refers to his previous order with regard to the suits which had been posted for trial on that date. As the defendants were absent, the *ex parte* decree already made was declared to be revived and stood.

*Rajagopalachari v. Thathachariar*[1], a decision of Madhavan Nair, J., (as he then was), is distinguishable on several grounds amongst which is the fact that both parties throughout treated the matter as relating to two orders. The words of the order were in that case: "the *ex parte* decree will be set aside if in two weeks petitioner pays . . . If he does not pay, petition will stand dismissed with costs." Then it was added that the petition was to be called for final disposal on a later date. There were thus a conditional order and a final order. In the present case, there was one order which was a final order on the 5th July, 1943.

V.S. — *Order varied.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Schwebo K. S. RM. Firm, through partner, Govindan *alias* Ramanathan Chettiar .. *Appellant**

*v.*

Subbiah *alias* Shanmugham Chettiar, now known as, S. P. Shanmugham and others .. *Respondents.*

*Transfer of Property Act (IV of 1882), section 53—Partition between father and sons—Unequal shares—Attachment of sons' share in execution—Validity—Sham transaction—Effect.*

Where the partition entered into between the father and his sons is unequal and the father has been allotted a smaller share than would be his due with intent to defeat his creditors the latter can avoid the partition under section 53 of the Transfer of Property Act and proceed against what would be his proper share in the family properties in execution of the decree obtained against him ignoring the allotment of the properties at the partition. They cannot however proceed against the sons' shares in such execution as the division of status brought about by the partition will stand notwithstanding the avoidance of the partition as a fraudulent transfer.

Where the partition is fair and in accordance with the proper share of the parties it is not liable to be impeached under section 53, although it was entered into with a view to prevent attachment of the sons' shares in execution of decrees obtained against the father after the partition and was in that sense *mala fide*.

But a mere colourable partition not meant to operate between the parties can be ignored and the creditor can enforce his remedies as if the parties still continued to be joint.

*Indoji Jethaji* v. *Kothapalli Ramacharyulu*, (1919) 10 L.W. 498, *Rasa Goundan* v. *Arunachala Goundan*, (1923) 44 M.L.J. 513, *Veerappa Chettiar* v. *Annamalai Chettiar*, (1934) 68 M.L.J. 157, *Kuppan Chettiar* v. *Masa Goundan*, (1937) 1 M.L.J. 249: I.L.R. 1937 Mad. 1004 referred to.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in O. S. No. 75 of 1939 dated 29th November, 1941.

1. A.I.R. 1925 Mad. 1182.

* Appeal No. 258 of 1942. 24th February, 1944.

*K. Bhashyam Aiyangar* and *V. Seshadri* for Appellant.

*B. Sitarama Rao* and *R. Subramaniam* for Respondents.

The Judgment of the Court was delivered by

*Patanjali Sastri, J.*—This appeal has been brought by the plaintiff, a firm of Nattukottai Chetty money lenders and bankers, from a decree of the Court of the Subordinate Judge of Sivaganga dismissing their suit for setting aside an order whereby the four-sixths share of the respondents 1 to 4 in their joint family property was released from attachment in execution of an order for restitution passed by the the High Court of Judicature at Rangoon. The fifth respondent was impleaded *pro forma* as the receiver appointed in certain proceedings which were pending between the partners of the appellant firm, and no further reference will be made to him herein.

The respondents' father Subramaniam Chettiar, who was carrying on business as banker and money lender at Rangoon and other places under the name and style of " AT. K. PL. SP. Chettiar Firm " sued the appellants and others in the High Court at Rangoon in its original jurisdiction for recovery of Rs. 20,000 and obtained a decree on 27th July, 1931. The appellants preferred an appeal to the same Court in its appellate jurisdiction on 17th August, 1931, and pending the appeal deposited the decree amount in Court on 2nd December, 1931, as one of its partners was arrested in execution of the decree. The money was drawn out by the decree-holder on the same day and the execution proceeding was closed. On 11th May, 1933, the appeal was allowed and the suit brought by the respondents' father was dismissed so far as the appellant firm was concerned. Thereupon the latter applied for restitution of the sum of Rs. 20,000 with interest and obtained an order for payment of Rs. 22,690 with further interest at nine per cent. till realisation together with costs of the application. This order was passed on 10th July, 1933. As no payment was made in compliance with the said order, the appellants applied on 27th April, 1936, for leave to take out execution. The application stated that respondents' father Subramaniam Chettiar was trading under the name and style of AT. K. PL. SP. for the benefit of his family and that leave should be granted under the provisions of Order 21, rule 50, Civil Procedure Code read with Order 30, rule 10, to execute " the decree for restitution passed on 10th July, 1933, by this Honourable Court " and the decree for costs in the appeal against "AT. K. PL. SP. Subramaniam Chettiar of Sirukudalpatti, Ramnad District." It may be mentioned here that the combined effect of the provisiors referred to above is to rendei it necessary for a decree-holder who has obtained against a person carrying on business in a name or style other than his own name a decree in such name or style, to obtain the leave of the Court before executing the decree against any person whose position as the proprietor to the business has not already been established. The provisions contemplate the adjudication of the liability of such person as the proprietor of the business where such liability is disputed before leave to execute is granted. As the appellant's application alleged that the respondents' father was carrying on the business under the name of "AT. K. PL. SP. Chettiar firm" for the benefit of his family and asked for leave to execute under the provisions specified, the respondents' father filed a statement of objections contending (para. 4) that in the absence of the parties on whom the restitution order was said to be binding the Court could not adjudicate as to who are the persons liable and (para. 5) that the business of AT. K. PL. SP. Chettiar firm was not carried on behalf of and for the benefit of his family. To this the appellants filed a reply wherein they stated " The application is for execution against AT. K. PL. SP. Subramaniam Chettiar and no relief is claimed now against any others. The contentions do not therefore arise for consideration at the present stage." On this the Court passed the following order on 12th June, 1936. " Both sides now agree that AT. K. PL. SP. Subramaniam Chettiar is carrying on business as the sole proprietor of the AT. K. PL. SP. Chettiar firm and Mr. Anklesaria (counsel for the latter) has no objection to leave being granted for execution of the order dated 10th July, 1933, against him as such sole proprietor.

Mr. Venkataram (counsel for the appellants) is satisfied with such leave. There will be an order accordingly granting leave for executing the order for restitution etc." Having obtained such leave, the appellants got the "decree for restitution" transmitted to the Subordinate Judge's Court of Sivaganga, Ramnad District, for execution and filed an application in that behalf on 10th August, 1936. In that application however, "the judgment-debtor against whom the decree was to be executed" was described as "AT. K. PL. SP. Chettiar firm by proprietor Subramaniam Chettiar (as manager of his joint family)", and attachment of certain immovable properties "which belong to the joint family of the aforesaid Subramaniam Chettiar" and other consequential relief were sought. When attachment of these properties was effected petitions were filed by the respondents herein and by their step brother, Palaniappa Chettiar under Order 21, rule 58, Civil Procedure Code, praying that the four-sixths share of the former and the one-sixth share of the latter in the family properties should be released from attachment on the ground that, before the order for restitution was made, they had become divided from their father under a partition deed dated 12th December, 1932. The Court allowed the claims of the sons and directed the release of their shares from attachment holding that the partition was not a sham transaction as contended by the appellants herein, and that the claimants were in possession of their shares. It is to set aside the order thus obtained by the respondents releasing their four-sixths share in the family properties which were attached and to declare that the appellants are entitled to proceed against the said share in execution of the decree for restitution that the present suit has been brought. As the appellants attacked the partition not only as a mere sham and colourable transaction but also, in the alternative, as having been brought about with intent, to defeat and delay the creditors of the father even if it was intended to be operative between the parties thereto, the suit was instituted on behalf of all the creditors of Subramaniam Chettiar as required by section 53 of the Transfer of Property Act. A similar suit was filed against Palaniappa Chettiar the other son of Subramaniam Chettiar but that suit is not now before the Court.

The Court below did not go into the question whether the business of AT. K. PL. SP. Chettiar Firm at Rangoon was joint family business of the respondents and their father or was carried on by the latter as his own individual concern in which his sons had no interest. Dealing with the case on the assumption that it was a joint family business, the Court below found that (1) the partition put forward by the respondents was neither a sham and colourable transaction nor one brought about with intent to defeat or delay creditors, (2) the liability for restitution arose only when the decree of the trial Judge was reversed on appeal and that therefore it was not a pre-partition debt, (3) even on the footing that such liability arose at the time of the recovery of the money from the appellants and was thus a pre-partition debt, the shares allotted to the sons at the partition could not be proceeded against in execution as the order for restitution was obtained against Subramaniam Chettiar after he ceased to represent the respondents by reason of the partition and, (4) in any event, the appellants were precluded by the terms of the order dated 12th June, 1936, whereby leave was given to execute the restitution order against Subramaniam Chettiar as the "sole proprietor" of the AT. K. PL. SP. Firm from claiming relief against the respondents in these proceedings. The appellants contest all these findings.

On the question of partition, we find it difficult to accept the suggestion of the appellants that it was a mere colourable and sham transaction not meant to operate between the parties. It is true that Subramaniam Chettiar's sons were all minors at the time of the partition and that they continued to be joint even after the partition. And it is also true that there was no division of the properties by metes and bounds and that the recital as to there being no debts payable by the family was false, as there was a mortgage for Rs. 30,000 outstanding on one of the properties included in the deed. It is also in evidence that Subramaniam Chettiar departed from British India a few months later to avoid pressure of creditors and was eventually

adjudicated insolvent. But these considerations, while no doubt giving rise to a strong suspicion that the parties intended to secure, if possible, the sons' shares in the family properties from the reach of the father's creditors as suggested for the appellants, do not lead to any inference that the transaction was not intended to be operative between the parties. Indeed, the very motive which according to the appellants prompted the execution of the deed at this juncture would be a strong reason for supposing that the parties intended to bring about a real partition, for a sham transaction would not serve the purpose they had in view. On the other hand, several witnesses including the writer and attestors have deposed that the partition was due to the quarrels between the two wives of Subramaniam Chettiar. The first wife, who had only one son, apprehending that the second wife who had already four sons was likely to have more, demanded that the family properties should be divided according to the number of wives, while Subramaniam Chettiar, and his second wife insisted the division should be according to the number of sons. The dispute is said to have been settled in the presence of the elder brother of the first wife (D. W. 2) and the father of the second wife (D. W. 5) by the father being given one and the sons five out of six shares. The Court below saw no reason to discredit the evidence of these witnesses and we are not disposed to differ from its view. We consider it unnecessary to review the evidence here as it has been considered in detail by the learned Subordinate Judge. It is sufficient to say that we agree with his conclusion that the partition was not a sham transaction intended to be inoperative between the parties.

But even so, urged Mr. Bhashyam for the appellants, the transaction was liable to be set aside under section 53 of the Transfer of Property Act as one brought about with intent to defeat or delay the creditors of Subramaniam Chettiar if not those of the family. The suit is no doubt framed as a representative action so as to admit of such relief being granted if the right to such relief is established but there are obvious difficulties in dealing with a partition among the members of a Hindu joint family as a "fraudulent transfer" coming within the section. A "transfer of property" is defined in section 5 of the Act as meaning "an act by which a living person conveys property in present or in future to one or more other living persons or to himself or to himself and one or more other living persons." Can it be said that a partition is an act of conveying property by one living person to another. And if so, where a creditor "avoids" it, is the division of status brought about by the deed of partition which is vacated as against the creditors also to be deemed as nullified? The first of these questions was answered in the affirmative and the second in the negative by Abdur Rahim, J., and *vice versa* by Spencer, J., in *Indoji Jithaji* v. *Kothapalli Ramacharlu*[1]. In *Rasa Goundan* v. *Arunachala Goundan*[2], Oldfield and Venkatasubba Rao, JJ., refused to accept the view of Spencer, J., and holding that a partition was a transfer of property to which section 53 was applicable, affirmed a declaration of its invalidity by the lower Court at the instance of a creditor. The facts do not appear from the report and it is not clear whether the creditor in avoiding the partition sought to proceed against the debtor as a divided or an undivided member. In *Kuppan Chettiar* v. *Masa Goundan*[3], Varadachariar, J., held that a partition between a father and his sons precluded a creditor who obtained a decree against the father after the partition from proceeding against the properties allotted to the sons, although the partition was brought about for the very purpose of preventing the decree-holder from executing his decree against such properties. The learned Judge expressed the opinion that unless a smaller share than what the father was otherwise entitled to, had been allotted to him at the partition, the transaction could not be assailed as a fraudulent transfer under section 53, however *mala fide* it might be in the sense that it was intended to defeat the right of a creditor holding a decree against the father to execute it against his sons' shares in the family properties. But if the partition was unequal and was consequently held not binding on the creditors of the father, the learned Judge opined that it would still be operative

1. (1919) 10 L.W. 498. 2. (1923) 44 M.L.J. 513.
3. (1937) 1 M.L.J. 249 : I.L.R. (1937) Mad. 1004.

to bring about a division of status and that although the father's proper share would be available to satisfy his debts, his creditors could not execute against the sons' interests, decrees obtained against the father alone after the partition. See also *Veerappa Chettiar* v. *Annamalai Chettiar*[1] and *Kuppan Chettiar* v. *Masa Goundan*[2], where the learned Judge has expressed similar views.

The authorities referred to above would thus seem to establish the following propositions :

(*a*) Where the partition is unequal and the father has been allotted a smaller share than would be his due with intent to defeat his creditors, the latter can avoid the partition under section 53 and proceed against what would be his proper share in the family properties in execution of decree obtained against him, ignoring the allotment of the properties at the partition ;

(*b*) they cannot, however, proceed against the son's shares in such execution, as the division of status brought about by the partition will stand notwithstanding the avoidance of the partition as a fraudulent transfer ; but

(*c*) where the partition is fair and in accordance with the proper shares of the parties, it is not liable to be impeached under section 53, although it was entered into with a view to prevent attachment of the sons' shares in execution of decrees obtained against the father after the partition and was in that sense *mala fide* ; and

(*d*) a mere colourable partition not meant to operate between the parties could be ignored and the creditor could enforce his remedies as if the parties still continued to be joint.

Applying these propositions to the facts of the present case, it is to be observed that the partition in question practically did no more than define and fix the shares of Subramaniam Chetti and his sons in each item of ancestral property in accordance with their rights under the Hindu Law, and there was no attempt to favour the sons at the expense of the father's creditors. We have also found that it was not a sham transaction. Even assuming, therefore, that the circumstances in which the partition was effected justify the inference that it was brought about with a view to place the minor son's shares in the family properties beyond the reach of Subramaniam Chetti's creditors as far as it was possible under the law to do so, it cannot be " avoided " as a fraudulent transfer under section 53 of the Transfer of Property Act. It follows that the appellants are not entitled to attach the respondent's four-sixths share in the ancestral properties in execution of the decree for restitution which they have obtained from the High Court of Judicature at Rangoon even on the footing that Subramaniam Chetti's liability to make restitution arose even on 2nd December, 1931, when he drew the amount from Court, and was thus a pre-partition debt.

Mr. Bhashyam next put forward another line of argument on the footing that the business carried on in the name of the AT. K. PL. SP. Chettiar Firm was a family business. He urged that the suit which resulted in the recovery of Rs. 20,000 from the appellants must be regarded as having been brought by Subramaniam Chetti as the manager of the family representing all the members including the respondents, that such representation implied that the persons represented were parties to the proceedings though they were not *eo nomine* on the record, and that the partition in 1932, during the pendency of the appeal preferred by the appellants herein, was immaterial as it could not affect the position of the respondents as parties to the proceedings throughout including the proceedings of restitution. Strong reliance was placed in support of the argument upon the decision of a Full Bench in *Venkatanarayana* v. *Somaraju*[3], where a decree for mesne profits passed against a Hindu father after a partition between himself and his son was held executable against the son as the latter must be deemed to have been a party to the suit which was commenced before the partition when the father must be taken to have represented the son,

1. (1934) 68 M.L.J. 157.
2. (1937) 1 M.L.J. 249 : I.L.R. (1937) Mad. 1004.
3. (1937) 2 M.L.J. 251 : I.L.R. (1937) Mad. 880 (F.B.).

as he was the manager of the family and the suit arose out of a transaction entered into on behalf of the family. The learned Judges referred to various Privy Council decisions, holding that decrees obtained by or against a manager of a joint Hindu family bound the other members as they must be deemed to have been represented by the manager, and argued that this could be so only on the footing that the junior members were constructively parties through the manager. Venkatasubba Rao, J., observed :

> " The reasons for holding that the members not joined should be held liable is, that they are substantially parties to the suit through the manager, in other words, they are sufficiently represented, though not *eo nomine* parties on the record. It follows from this that the decree can be executed not only against the parties whose names appear but also against those who must be deemed to be constructive parties. In the view it is immaterial whether the family continues to remain joint or became divided."

And Venkataramana Rao, J., said :

> " A judgment against a person sued in a representative character is a judgment against every individual member covered by the representation and therefore the bar of *res judicata* is held to apply to a member of a family not a party *eo nomine* to the litigation represented by its manager ; vide *Lingangowda* v. *Basangowda*[1].
>
> * * * * * *
>
> When they must be held to be parties to the suit, it is immaterial what the character of the property in their lands is, whether it is still undivided property or has become separate property by division."

This reasoning, however, would seem to overlook the fact that the applicability of the principle of *res judicata* which is made applicable to such cases by explanation 6 of section 11, Civil Procedure Code (*See Lingangowda* v. *Basangowda*[1]) rests,not on the theory that the persons represented by the party litigating in respect of the common right are parties to the suit, but on the ground that such persons "shall, for the purposes of this section, be deemed to claim under the persons so litigating" which necessarily implies that these persons are themselves *not* parties to the suit. However that may be, we are clearly of opinion that it is not open to the appellants in these proceedings to claim relief on the footing that the AT. K. PL. SP. Chettiar Firm at Rangoon was a joint family concern. As stated already, the appellants obtained leave to execute the restitution decree and got it transmitted to the Court at Sivaganga for execution expressly on the agreed footing that " AT. K. PL. SP. Subramaniam Chettiar is carrying on business as the sole proprietor of the AT. K. PL. SP. Chettiar Firm," the plea of family proprietorship of the business having been put forward by the appellants and withdrawn on objection raised by Subramaniam Chetti, the appellants stating that " the application is for execution against AT. K. PL. SP. Subramaniam Chettiar and no relief is claimed against any others." Mr. Bhashyam sought to explain that the reference to " sole proprietor" in the order of the Court, Ex. D-2 (*c*) dated 12th June, 1936, and to " any others " in the appellant's reply affidavit Ex. D-2 (*b*) was only intended to convey that there were no other partners in the business, but this explanation cannot be accepted as the issue then raised did not relate to any partnership with strangers but only to the proprietorship of the joint family. We are therefore inclined to agree with the learned Subordinate Judge that the appellants are precluded by the terms of the order dated 12th June, 1936, based on the consent of parties from claiming relief in these proceedings by way of attachment of the respondents' share in the family properties on the footing that the " AT. K. PL. SP. Chettiar Firm " was a family business.

The conclusions we have reached on the points discussed above are decisive of the appeal and it is uenecessary to say anything on the other questions argued before us.

The appeal fails and is dismissed with costs.

B.V.V. ——— *Appeal dismissed.*

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1. (1927) 52 M.L.J. 472 : L.R. 54 I.A. 122 : I.L,R. 51 Bom. 450 (P.C.).

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Veerappan .. *Petitioner**

*Companies Act (VII of 1913), sections 282-A and 238-A—Offence under—Sentence—Managing agent of bank in liquidation—Failure to deliver jewels to liquidator—Offence.*

The petitioner was the managing agent of a Bank which was under liquidation. The case against the petitioner was that he failed to deliver up to the liquidator certain jewels. His case was that he was not in possession of the jewels as they had been pledged with another person. The Court however found that the story of the pledge was not true and that he was liable to account for them.

*Held*, that under the circumstances the petitioner was not liable to be convicted for an offence under section 238-A (1) (*b*) of the Indian Companies Act, as there was no evidence to show that the jewels were under his control when the company was being wound up.

*Held further*, that the petitioner was guilty of the offence under section 282-A of the Companies Act as he had wrongfully withheld the jewels from the official liquidator. Under section 282-A, the direction to deliver the jewels with a punishment for default is an additional sentence that could have been imposed in addition to the sentence of fine.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of the Ramnad Division at Madura dated 8th April, 1943, and passed in Criminal Appeal No. 26 of 1943, preferred against the judgment of the Court of the Sub-Divisional Magistrate of Devakottah dated 27th February, 1943, and passed in C. C. No. 147 of 1942.

*K. Kalyanasundaram* for *V. T. Rangaswami Aiyangar*, for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the Sessions Judge of Ramnad confirming the order of the Sub-Divisional Magistrate of Devakottah convicting the petitioner for offences punishable under section 238-A (1) (*b*) and section 282-A of the Indian Companies Act. He was sentenced to rigorous imprisonment for one year and a fine of Rs. 500 in respect of the offence punishable under section 238-A (1) (*b*). He was directed to return the jewels in question within three months failing which he was sentenced to rigorous imprisonment for six months under section 282-A of the Indian Companies Act.

The petitioner was the managing agent of the Nagarathar National Bank, Limited of Kandanoor. It was under liquidation and the Official Receiver of Ramnad was the Official Liquidator. The case against the petitioner was that he failed to deliver up to the liquidator, appointed by the Court in the winding up proceedings, certain jewels mentioned in the petition. His case was that he was not in possession of the jewels, as they had been pledged with one Viravan Chetti of Arimalan. Both the Courts have found that the story of the pledge was not true and that he ought to account for the jewels. On facts, I see no reason to interfere with the finding that the pledge was not true. At the earliest opportunity, when he was asked, he did not mention that pledge to Vairavan Chetti. Even as per the accused's version, the jewels were worth more than Rs. 3,000. To prove his case that they were pledged for that amount, he has not filed any voucher obtained for it, nor was the fact noted in the accounts. An entry about Rs. 3,000 held in suspense was sought to be connected with this transaction. But as was pointed out by both the Courts below, there were several such entries. In those circumstances, it cannot be said that the first Court was wrong in appreciating the evidence in the manner it did and coming to the conclusion that the story of the pledge to Vairavan Chetti was an after-thought and cannot be accepted.

The only other question for consideration is, whether on the evidence the petitioner could be convicted for an offence punishable under section 238-A (1) (*b*)

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* Crl. R. C. No. 393 of 1943. 2nd November, 1943.
(Crl. R. P. No. 354 of 1943).

of the Indian Companies Act. Under that section, the prosecution will have to prove that the petitioner had in his custody, or under his control the jewels *at the time when the company was being wound up.* There is no evidence on that point. Consequently, he could not be convicted for the offence under that section. But then, he will be guilty of the offence punishable under section 282-A; for not only is there evidence, but there is also the accused's admission that these jewels were with him. Therefore, they were jewels in his possession, which was wrongfully withheld. It must be considered to have been wrongfully withheld, in view of the fact, that he had not handed them over to the liquidator and his version of the pledge has been found to be false. He is, therefore, liable to be punished for the offence punishable under section 282-A of the Indian Companies Act. Under that section he is liable to be punished with fine not exceeding Rs. 1,000 and he may also

> " be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully misapplied or in default to suffer imprisonment for a period not exceeding two years."

It is rather unfortunate that both the Courts below have failed to notice that no sentence of fine for the offence punishable under section 282-A had been passed. The direction to deliver the jewels with a punishment for default is an additional sentence that could have been imposed in addition to a sentence of fine. But then, the order directing the delivery of jewels is correct. It is true that the Court can either order return of the jewels or a refund. But the Court ordered the former. Since, admittedly, the petitioner has not returned the jewels, the sentence of imprisonment will have to stand.

In the result, the conviction and sentence for the offence punishable under sction 238-A (1) (*b*) is set aside. The conviction and sentence for the other offence is confirmed.

B.V.V. ——— *Conviction modified.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

B. Muniswami Chetty and Company a firm of merchants, carrying on business at No. 86, Godown Street, G.T., Madras .. *Appellants**

*v.*

D. Muniswami Chetty and Company a firm of merchants, carrying on business at No. 96 Godown Street, G.T., Madras .. *Respondents.*

*Sale of goods—Breach of contract relating to—Damages—Market price—Relevant date—Contract Act, S. 73—Applicability.*

A contract to sell 5 bales of printed muslin provided, that delivery should be given "ex-godown as and when the goods come". The goods arrived in Madras on 2nd December, 1942 when the seller delivered to the buyer only two bales. The buyer made a demand on 9th December for the remaining three bales which they had bought. It was not complied with. On a question as to the relevant date for the calculation of damages based on the market price;

*Held*, that the stipulation in the contract as to delivery amounted to a contract for delivery on the date of their arrival in Madras. As only two bales were delivered on that date, the contract was broken on that date to the extent of the remaining three bales. S 73 of the Contract Act must, by reason of S. 3 of the Sale of Goods Act be taken to apply to such a case; hence damages for breach of the contract must be based on the market price ruling at the date of breach, namely, 2nd December, 1942 and not the 10th December, 1942 when the seller failed to comply with the demand for delivery of the remaining bales.

On appeal from the judgment and decree of Chandrasekhara Ayyar, J., dated 15th April, 1943, and passed in the exercise of the ordinary original civil jurisdiction of the High Court in C. S. No. 21 of 1943.

*K. Rajah Aiyar* and *A. Ramachandran* for Appellants.

*C. Srinivasachari* and *C. Devarajan* for Respondents.

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* O. S. A. No. 37 of 1943. 1st March, 1944.

The Judgment of the Court was delivered by

*The Chief Justice.*—The appellants entered into a contract to sell to the respondents five cases of printed muslin. The appellants delivered only two of the five bales and consequently the respondents filed a suit on the original side of this Court for the recovery of the damages suffered by them as the result of the appellants' breach. The appellants denied that they were in default, but the learned Judge (Chandrasekhara Ayyar, J.) held that they were and that they were liable to the respondents in the full amount of their claim. The appellants have appealed. They say that the learned Judge was wrong in holding that they had broken the contract and that in any event he has assessed the damages on a wrongful basis. We are in agreement with the learned Judge on the question whether the appellants broke the contract, but we consider that the damages have been assessed on an erroneous basis.

The contract is in writing and is dated the 23rd November, 1941. The goods had to be obtained from the United Kingdom and the sellers undertook to make the shipment in the month of November, unless they were prevented by *force majeure.* If by reason of circumstances beyond their control the shipment was delayed they were to be entitled to "unlimited free extension." The contract was signed after the appellants had entered into a contract with the firm of Ralli Brothers, under which they were to buy from Ralli brothers twenty five bales of the same kind of muslin. The respondents were not concerned with any arrangement between the appellants and Ralli Brothers. The contract between the parties to this suit made no mention of the contract between the appellants and Ralli Brothers and was quite independent. The appellants also agreed to sell similar goods to two other persons. They expected to be able to fulfil all the three contracts out of the goods which were to be supplied to them by Ralli Brothers.

The shipment was delayed and it has been accepted that the delay arose out of a cause beyond the control of the appellants. Twelve out of the twenty five bales which the appellants bought from Ralli Brothers arrived in Bombay on the 22nd October, 1942, and were forwarded by Ralli Brothers to the appellants in Madras. The goods arrived in this city on the 2nd December, 1942, when the appellants delivered to the respondents two of the twelve bales. They delivered two bales to each of the two other persons with whom they had contracted and retained the balance of six bales for sale by themselves. The market was rising then. The respondents having ascertained that the appellants had received twelve bales demanded delivery of three bales to make up the five bales which they had bought. This demand was made on the 9th December, 1942, but was not complied with. Thereupon the respondents filed the suit which has given rise to this appeal.

Both the parties have treated the shipment of goods which arrived in Bombay on the 22nd October, 1942, as a shipment under the contract. In other words, the respondents have accepted the position that the appellants were not able to make the shipment before. The respondents were entitled under the contract to the delivery of five bales. As the appellants only delivered to them two bales, the contract was broken to the extent of three bales.

The contract provided that delivery should be given "ex-godown, as and when the goods come." The learned Judge held that the date to be taken for the assessment of the damages was the 10th December, 1942 and in this connection relied on section 35 of the Sale of Goods Act, which says that apart from an express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery. The damages based on the market price ruling on the 10th December, 1942, amounted to Rs. 6075 and a decree for this amount was passed. On the other hand, the appellants say that here there is an express contract. The sellers were bound to deliver to them the goods as soon as they arrived in Madras, which was on the 2nd December, 1942. If this date is to be taken, it is agreed that the decree will be for Rs. 4,725 and not for Rs. 6,075.

We have no hesitation in accepting the contention of the appellants. The stipulation that delivery should be given as and when the goods arrived in Madras amounted to a contract for delivery on the date of their arrival here. Although contracts relating to sale of goods are now dealt with under the Sale of Goods Act, 1930, certain sections of the Contract Act still apply to contracts for the sale of goods. Section 3 of the Sale of Goods Act says that the unrepealed provisions of the Contract Act, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts for the sale of goods. Section 73 of the Contract Act makes it clear that damages for a breach of a contract of the nature of the one we are now considering must be based on the market price ruling at the date of the breach. In the Sale of Goods Act there is nothing inconsistent with section 73 of the Contract Act, and it must be taken to apply. If the contract had contained no stipulation with regard to delivery, the decision of the learned Judge would be right, but it did stipulate when the delivery was to be made and delivery in this case should have been made on the 2nd December, 1942, which means that the contract was broken on that date. It follows that the respondents are entitled to Rs. 4,725 not to Rs. 6,075. The decree of the trial Court will be modified accordingly.

The appellants will pay costs on Rs. 4,725 and receive costs on Rs. 1,350 here and below.

V.S. ——— *Decree modified.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Ramadugu Venkatanarasimham .. *Appellant**

*v.*

Kallam Subba Reddi and others .. *Respondents.*

*Civil Procedure Code (V of 1908), Order 2, rule 2—Suit for recovery of property as stridhanam heir—Prior suit by same party alleging that a certain will mentioned to have disposed of property in favour of defendant was not genuine—Omission in that suit to ask for the same relief as in the later suit—Later suit whether barred.*

Where a person sued for recovery of properties belonging to a deceased lady as her stridhanam heir the contention was raised that it was barred by reason of his omission in a prior suit brought by him regarding the setting aside of an alleged will of the deceased dealing with certain properties to seek the same relief.

*Held*, that the real cause of action in both suits having been the unlawful withholding of the properties of the deceased after her death by the defendant who was not entitled to it, the prior suit was a bar to the subsequent suit.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in A. S. No. 179 of 1938, preferred against the decree of the Court of the District Munsiff of Guntur (Additional) in O. S. No. 132 of 1936.

*M. S. Ramachandra Rao* for Appellant.

*K. Kameswara Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The suit out of which this appeal arises was one for property belonging to the deceased Narasamma, whose stridhanam heir the plaintiff is. The question is whether he is barred from bringing the present suit on account of his omission in a prior suit to ask for the same relief. It is not denied that he could have asked for this relief in the prior suit, but the question is whether he was bound to do so.

The prior suit, O. S. No. 1368 of 1927, was for certain property, movable and immovable, which had been in the possession of Narasamma before her death, the immovable property having been purchased with funds she derived from gifts and maintenance paid to her by her father-in-law. The plaintiff relied in the first instance on a contract which Narasamma had entered into with her father-in-law

* S. A. No. 115 of 1943. 2nd February, 1944.

at the time she received these gifts that she would return to the family whatever movables she died possessed of. The plaintiff claimed that the agreement would also apply to the immovable property purchased with the movable property she had in her possession. Before the plaintiff brought the suit, the present first defendant put forward a will as being that of Narasamma, under which she purported to dispose of the property in her possession; but the property which is the subject of this suit was not the subject of the will. In the prior suit, the plaintiff asked for a declaration that the will was not a true one and was not binding on him. The Court found that the will was not genuine. It held that the contract was true; but that it was not necessary to construe its provisions, because the plaintiff was the stridhanam heir of Narasamma and was entitled to the property on her death if it had been undisposed of by will, whether under the contract he was entitled to the property or not.

There can be no doubt that in both these cases the chief constituent of the cause of action is the wrongful detention by the first defendant of property which belonged to the plaintiff as soon as Narasamma died. The argument of the appellant is, however, that although that is the sole cause of action in this case, yet in the prior case, another part of the cause of action was the putting forward by the defendants of a fictitious will; and that as the cause of action—in the words used in *Murti* v. *Bholaram*[1]—is defined as consisting of "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court," the cause of action in the prior case consisted of two facts, one relating to the will and one relating to the unlawful detention after Narasamma's death. In the present case, it is argued that there is only one action of which the plaintiff complains: and that is the unlawful detention of the property by the first defendant after Narasamma's death. The learned advocate for the appellant has quoted *Pittapur Rajah* v. *Suryarao*[2], a decision of the Privy Council, in which the plaintiff obtained title to some movable and immovable property by a will. He became dispossessed of the immovable property by a wrongful act of the defendant and so brought the suit. The question was whether a subsequent suit for personal property was barred under section 7; and their Lordships decided that it was not, because the cause of action with regard to the immovable property was entirely different, namely, the wrongful dispossession by the defendant. The plaintiff framed the present suit more or less on the lines of *Pittapur Rajah* v. *Suryarao*[2], by asserting that he had been dispossessed, but as that point has been found against him, he does not now contend that he was dispossessed. The case which most closely resembles the present case is *Muhammad Umar Khan* v. *Umamatul Rahim Bibi*[3], where the plaintiff alleged in the earlier suit that the transaction under which property appeared to have been conveyed by the person through whom the plaintiff was claiming, was fictitious. The learned Judges say:

> "So far as his claim to be heir of Ahmed Ali Khan is concerned, this portion of the cause of action is common to the previous suit and to the present suits. It is clear, however, that this allegation alone would not entitle the plaintiff to succeed in the previous suit. He was met by the plain fact that at the time of Ahmed Ali Khan's death the property did not stand in Ahmed Ali Khan's name. Ahmed Ali Khan had parted with it in his lifetime by a registered sale deed."

Thus far, that case may be said to resemble very closely the present case, in that it was alleged that Narasamma had purported to dispose of her property by a will. The learned Judges, however, went on to say, "unless that sale deed was set aside it stood in the way of the plaintiff's claim and the plaintiff could claim no relief." With due respect, this does not seem to be quite correct; because if the transaction was fictitious there was no necessity to set it aside. That statement is however not very material, because the learned Judges then quoted the definition of "cause of action" in *Murti* v. *Bholaram*[1] above referred to, in which it was said that every fact which it was necessary for the plaintiff to prove would form part of the cause of action, and said that it was necessary for him to prove that the transaction was

1. (1893) I.L.R. 16 All. 165 (F.B.).
2. (1885) L.R. 12 I.A. 116 : I.L.R. 8 Mad. 520 (P.C.).
3. (1923) I.L.R. 45 All. 376.

fictitious ; otherwise, the plain fact of an apparent alienation would stand in his way, the property not even standing in the name of Ahmed Ali Khan at the time of his death. I do not feel that the same can be said of a will. The plaintiff had not to prove that the will was fictitious. All that he had to prove was that Narasamma died leaving certain property. If the defendants relied on a will, it was their duty to prove that it was a valid will, disposing of her property and so leaving nothing for the plaintiff. As was pointed out in *Darbarilal* v. *Govind Saran*[1], although the matter is not discussed in any great length there—" it is immaterial for him (plaintiff) whether the defendant wants to justify his right to continue in possession on different grounds (in the two suits)." In one suit, the defendant may hold up a fictitious will to oppose the plaintiff's claim and in another case he may put forward some other plea such as adverse possession ; but the real cause of action in both cases here is the unlawful withholding of Narasamma's property after her death by the first defendant, who was not entitled to it. The fact that the reference to the will is first mentioned in the plaint and not in the written statement can make no difference ; or it would be always possible for the plaintiff to avoid the bar of Order 2, rule 2, by anticipating the objections of the defendant and referring to them in his plaint.

As the decision of the lower Court is right, this appeal is dismissed with costs.

K.C. *Appeal dismissed.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

The Public Prosecutor .. *Petitioner**

*v.*

Balla Venkayya .. *Respondent.*

*Sentence—Substantive sentence of imprisonment—Imprisonment in default of payment of fine awarded for another offence tried in the same case—Such sentences of imprisonment cannot be directed to run concurrently.*

The accused was convicted for offences punishable under sections 448 and 379, Indian Penal Code and sentenced to rigorous imprisonment for 2½ months for the offence punishable under section 379 and to pay a fine of Rs. 50 with rigorous imprisonment for 1½ months in default for that punishable under section 448 and the imprisonments were directed to run concurrently. On the question as to the legality of such direction,

*Held*, that no provision is made in the Criminal Procedure Code for directing imprisonment in default of payment of fine to run concurrently with the substantive sentence of imprisonment awarded for any other offence tried in the same case and hence the order giving such a direction could not be upheld and has to be set aside.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Stationary Sub-Magistrate of Razole in C. C. No. 230 of 1943.

The Public Prosecutor (*V. L. Ethiraj*) in person.

Respondent not represented.

The Court made the following

ORDER.—This is a petition by the Crown to revise the sentence imposed by the Sub-Magistrate of Razole on the first accused in C. C. No. 230 of 1943.

The accused in the case was convicted for offences punishable under sections 448 and 379 of the Indian Penal Code and sentenced to rigorous imprisonment for 2½ months for the offence punishable under section 379, Indian Penal Code and to pay a fine of Rs. 50 with rigorous imprisonment for 1½ months in default for that punishable under section 448, Indian Penal Code. The imprisonments were directed to run concurrently. Section 35, Criminal Procedure Code, deals only with cases of substantial punishments by imprisonments for distinct offences in the

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1. (1924) I.L.R. 46 All. 822.

* Crl. R. C. No. 856 of 1943. (Crl. R. P. No. 802 of 1943). 2nd December, 1943.

same case. It is only in such cases that provision is made in that section for directing the sentences of imprisonments to run concurrently. Section 398 of the Code deals with cases of sentences of imprisonment in default of payment of fine. It directs the sentence to run consecutively and not concurrently. Section 395 deals with cases of imprisonment awarded in different cases which may be directed to run concurrently. No provision is made in the Code for directing such imprisonments in default of payment of fine to run concurrently with the substantive sentence of imprisonment awarded for any other offence tried in the same case. The order therefore directing the imprisonments to run concurrently is set aside.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Katta R. Venkatesayya and another .. *Petitioners**

*v.*

Mahammad Ghouse Saheb .. *Respondent.*

*Practice—Question as to what happened in Court—Statement of the presiding Judge is conclusive.*

When a question of fact arises as to what happened in the lower Court, the statement of the presiding Judge is conclusive and an affidavit of the advocate in the lower Court is not admissible to controvert it.

*Reg* v. *Pestonji Dinsha*, (1873) 10 B.H.C.R. 75 and *Rex* v. *Grant and others*, (1834) 5 B. & Ad. 1081, 1087 : 110 E.R. 1092, referred to.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of Anantapur dated the 23rd day of December, 1942, and made in I. A. No. 74 of 1942 in O. P. No. 97 of 1940.

*A. Gopalacharlu* for Petitioners.

*V. S. Narasimhachar* for Respondent.

The Court delivered the following

JUDGMENT.—This petition arises out of an order passed by consent under Order 9, rule 13 of the Code of Civil Procedure. The ground now taken is that this petitioner did not in fact consent and that the learned Judge was labouring under a mistake of fact in thinking that he did consent. In support the petitioner has filed an affidavit by his advocate in the lower Court. The respondent has resisted on the ground that when a question of fact arises as to what happened in the lower Court the statement of the presiding Judge is conclusive. Reliance is placed on the decision in *Reg* v. *Pestonji Dinsha*[1], where Westropp, C.J., put the proposition in these words :

"The statement of the Judge, who presides at a trial, whether it be in a criminal or civil case, is, as to what has taken place at the trial, conclusive. Neither the affidavits of bystanders, nor of jurors, nor the notes of counsel, nor of short-hand writers are admissible to controvert the notes or statement of the Judge."

The learned Chief Justice proceeded to cite a number of cases, from one of which an extract may be quoted. In *Rex* v. *Grant and others*[2], Taunton, J., made this observation :

"The question is, whether the affidavits of bystanders are to be admitted, to prove that the Judge who presided at a trial is guilty of mistake as to what passed. If such affidavits were now received, it would be the first instance of such a practice, and would produce the greatest injury to the administration of justice."

The learned advocate for the petitioner has not been able to produce any authority contra. As the statement of the learned Judge as to what happened is conclusive, it necessarily follows that there is no error of jurisdiction in his order and the petition is ordered to be dismissed with costs.

K.S. ——— *Petition dismissed.*

* C. R. P. No. 622 of 1943. 17th February, 1944.

1. (1873) 10 Bom.H.C.R. 75.

2. (1834) 5 B. & Ad. 1081, 1087 : 110 E.R. 1092.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

T. S. Swaminathan .. *Petitioner**

*Criminal trial—Documents in Court—Right of accused to have inspection—Circumstances when inspection may be permitted.*

There is no provision either in the Criminal Procedure Code or in the rules made by the High Court as regards the right of inspection by an accused person of the records in the custody of the Court in which he is being tried.

If there are documents relied upon by an accused either for dislodging the prosecution case or for building up his own case, he will have to take out a summons for them. If the object of the inspection is merely to fish for information, it is not a thing to be permitted. If documents are in the custody of private individuals he can claim no right to look into them unless he takes out a summons for them and gets them into Court. If they are not produced, the proper course for him is to move the Court to issue a search warrant under section 96 of the Criminal Procedure Code, after satisfying the Court they are essential. Merely because the documents are in Court, that will not give him a right which he would not have, if the documents were in private custody.

If documents have been summoned for, he will be entitled to obtain permission of the Court to examine them. In respect of documents not summoned he will not be entitled to inspect them till they are tendered in evidence.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Special First Class Magistrate of Rajahmundry dated 25th February, 1944 and made in P. R. C. No. 1 of 1944.

*K. S. Jayarama Aiyar* and *C. Narasimhachariar* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—This is a petition by the first accused in P. R. C. No. 1 of 1944 on the file of the Special First Class Magistrate of Rajahmundry to revise the order of that Magistrate dismissing his petition to inspect (*a*) the entire case record files of the 33 criminal and other cases mentioned in paragraph (2) of the charge sheet as having been disposed of by the first accused, (*b*) the several Court records (which have not been specified) mentioned in paragraph 3 of the charge sheet as having been scrutinised by two sub-divisional Magistrates who were successors in office to the first accused as the result of which scrutiny first information was laid to the Police in about 23 crime numbers, (*c*) the many Court records, namely, chalans, fines registers, monthly statements of fines, entries of adjournments in cases, property registers, contingent registers, etc., referred to (but not specified) in paragraph 6 of the charge sheet, (*d*) the entire case record files of about 32 cases mentioned in para. 9 of the charge sheet as those in respect of which fine amounts, etc., are alleged to have been misappropriated by the accused, and (*e*) all the other records mentioned in the charge sheet. In short, the inspection sought was a roving one in respect of every available paper that could be found in the archives of the Magistrate's record room.

The application was opposed by the Public Prosecutor and the Magistrate after observing that most of the records concerned were seized by the Police and had been sent to the Court for the purpose of the relevant parts of the records being let in evidence in the preliminary inquiry and that they were not records of the Special Court yet, held that the petitioner was not entitled to have an inspection of them. He further observed, that the right to inspect would arise in respect of each document, or file, or record or register or chalan etc., as and when some fact connected with such document, is let in evidence by the prosecution and added :

"As the inquiry proceeds and evidence is let in by the prosecution, the documents, registers, records, etc., which have any particular connection with such pieces of evidence, may, if the accused so desires, be made available for his (or his pleader) inspection, at the discretion of the Court with due regard to the ends of justice."

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* Crl. R. C. No. 212 of 1944. 10th March, 1944.
(Crl. R. P. No. 203 of 1944).

It is urged before me that all the documents referred to are public documents and as such the accusd as a person who is interested in getting information about their contents is entitled to inspect them. Reliance is placed upon section 76 of the Evidence Act. Under that section, any person who has a right to inspect a public document will be entitled to receive a copy of it on payment of the legal fees therefor ; but then, in the explanation to that section, it is stated that it is only an officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed to have the custody of such documents. The registers and the case records are all of the Joint Magistrate's Court at Rajahmundry and it is the Joint Magistrate of Rajahmundry who can be said to be the officer having custody of those records and therefore it is to him that the accused must apply for copies of the documents. Section 76 of the Evidence Act cannot hence afford a basis for a claim of the kind which the accused has set up in this petition.

There is no provision either in the Criminal Procedure Code or in the rules made by this High Court as regards the right of inspection by an accused of the records in the custody of the Court in which he is being tried. The documents which the accused has asked for inspection may be divided into two classes, (1) those which are in the custody of the Court and have been summoned by the accused, and (2) those which are in the custody of the Court having been either received by the Court on a summons taken out by the prosecution or filed into Court by the prosecution. The accused could have a necessity to look into the documents filed by the prosecution only as and when they are tendered to the Court by the prosecution at the trial of the case, for until then, the accused is not bound to answer them, and if they are not tendered, there could be no necessity for him to look into them.

If there are any documents which are relied upon by the accused either for dislodging the prosecution case or for building up his own case, he will have to take out a summons for them. If the object of the inspection is merely to fish for information, it is not a thing that could be permitted. There may be documents in the custody of private individuals which may furnish necessary information for an accused but then he can claim no right to look into them unless he takes out a summons for them and gets them into Court. If they are not produced, the proper course for him would be to move the Court to issue a search warrant under section 96 of the Criminal Procedure Code after satisfying the Court they are necessary. Merely because the documents are in the custody of the Court, that will not give him a right which he would not have, if the documents were in private custody.

If the petitioner wants to prove with the help of any documents that any of the statements made by the prosecution witnesses is false or incorrect or if he wants to build up his case, as is generally done, even when the prosecution witnesses are being examined, it would be open to him to summon those documents beforehand. Such documents, it is not disputed by the learned Public Prosecutor, he will be entitled to inspect after they are received in Court or if they are in Court.

I have no definite information as to whether any of these documents which he wants to inspect have been summoned for or not. If they have been summoned for, he will be entitled to obtain the permission of the Court to examine them. In respect of the documents not summoned, he will not be entitled to inspect them till they are tendered in evidence or sought to be used during the course of the trial by the prosecution.

K.C. ——— *Ordered accordingly.*

## [THE FEDERAL COURT OF INDIA.]

(On Appeal from the High Court of Judicature at Madras).*

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

Maharani Gurucharan Kaur of Nabha and another .. *Appellants*†

*v.*

The Province of Madras and four others .. *Respondents.*

*Government of India Act (1935), section 270 (1)—Suit for damages for false imprisonment against police officers for preventing plaintiffs from boarding a train and detaining them in the railway station for sometime—Mistake of fact in regard to the person directed to be so prevented—Absence of the sanction of the Provincial Government under section 270 (1) if a bar to the maintainability of the suit.*

The Deputy Superintendent of Police, Madura, the second defendant, instructed the third defendant (a Sub-Inspector of the railway Police) on the phone to proceed to Kodaikanal Road Railway station by the Trivandrum Express and there prevent the ex-Maharaja of Nabha boarding that train. On the journey from Madura to Kodaikanal Road, the third defendant found that a compartment had been reserved in that train for the Maharani of Nabha. Believing that the instructions of the 2nd defendant related to the Maharani, the third defendant on arrival at Kodaikanal Road prevented the Maharani and her minor daughter from boarding that train at that station and also directed defendants 4 and 5, police constables, to close the only gate that could permit the Maharani and her daughter to get out of the Railway station and defendants 4 and 5 posted themselves at that gate with the view to prevent their egress. The Maharani filed a suit for damages for false imprisonment against defendants 2 to 5 and also claimed that the Government of Madras—impleaded as the first defendant was also liable for damages inasmuch as the other defendants had invaded her right to freedom in the course and as part of their official employment. On the pleas that there was no cause of action against defendants 1 and 2 and that the suit was not maintainable against defendants 2 to 5 without the previous sanction of the Provincial Government under section 270 (1) of the Government of India Act,

*Held*, Per *Spens, C.J.* (*Varadachariar, J.*, concurring).—The State could not be held liable for the improper conduct of public servants unless those acts had been done under the orders of the Government or had been subsequently adopted and ratified by it.

The plaintiffs had not made out any ground to make the second defendant legally liable.

It does not however seem so easy to exonerate the third defendant from legal liability. Assuming that the acts complained of cannot be regarded as done by defendants 3 to 5 in the execution of their duty, there still remains the other alternative, namely whether they *purported* to be so done. The word ' purporting ' in section 270 (1) of the Government of India Act would be rendered nugatory if the section were to be limited to acts justified or authorised by law The question of interpretation of this provision is substantially one of fact to be determined with reference to the nature of the act complained of and the attendant circumstances. Though the language of the corresponding provisions of the English Public Authorities Protection Act, 1893, is not identical with that employed in section 270 (1), the principle of the English decisions, in so far as they extend the statutory protection even to officers acting under a mistaken view as to their duty, is equally applicable here. The third defendant must have believed, however mistaken this belief was, that the 2nd defendant had instructed him to detain the plaintiffs. It is clear from his conduct that he also honestly thought that it was his duty to obey those instructions. Hence he is entitled to claim the benefit of section 270 (1) and the case of defendants 4 and 5 also clearly falls within that provision.

Per *Zafrulla Khan, J.*—The proposition that the words of section 270 (1) are wide enough to cover the case of an officer who has acted under a mistaken view as to his duty, if only he honestly believed that he was acting in the discharge of his duty, if interpreted literally would be found to state the principle too widely. If this section or other similar enactments are held to cover cases like the present one, the result would be that whatever may be the position with regard to a superior officer issuing an unlawful order, his subordinates executing such an order could always take shelter behind such provisions, a state of affairs which would amount to putting a premium upon official highhandedness and would reduce the rights of the subject to security of life and limb, liberty and the peaceful enjoyment of property to a mockery. This case is concerned only with a mistake of fact. The mistake occurred not in the execution of what the third defendant had correctly understood to be his duty, but in his imagining that a direction had been issued concerning the Maharani, when in fact it had been issued concerning the ex-Maharaja. The correct rule in cases of mistake of fact would be that for the purpose of determining whether an act done *bona fide* in pursuance of a mistake of fact would be governed by the sub-section, the true state of affairs must be deemed to have been what it was mistakenly supposed to be. The effect of the mistake under which it is alleged, the third defendant was labouring, cannot be stretched further to bring his acts and those of defendants 4 and 5 within the ambit of sub-section (1) of section 270.

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* (1942) 2 M.L.J. 14.

† Case No. 7 of 1943. 6th March, 1944.

*B. B. Tawakley* (with *Raghbir Singh*) instructed by *R. S. Narula*, Agent for Appellants.

*Sir Alladi Krishnaswami Aiyar* (Advocate-General of Madras) (with *N. Rajagopala Aiyangar*) instructed by *Ganpat Rai*, Agent, for Respondents.

The Court delivered the following Judgments :

*The Chief Justice* . (*Varadachariar J,* concurring).—This appeal arises out of a suit for damages for false imprisonment instituted by the appellants against the Government of Madras and four of its police officers. The incident complained of happened on January 13, 1937, at Kodaikanal Road, a station on the South Indian Railway. The appellants are mother and daughter ; as there is no separate case on behalf of the second appellant who is a minor, the first appellant will be referred to as the appellant in the course of this judgment. Kodaikanal Road is about 52 miles from Kodaikanal, a hill station in South India. The headquarters of the district is Madura, about 20 miles further south from Kodaikanal Road on the South Indian Railway. Madura is the headquarters of the second defendant who at all material times was the District Superintendent of Police. The third defendant was a Sub-Inspector belonging to the Madras Railway Police Service and defendants four and five are police constables of the same service. A brief narrative of the events that led up to the incident of 13th January, 1937, will help to make the contentions raised in the case intelligible.

The appellant is the widow of the ex-Maharajah of Nabha. By an order of the Government of India passed under the Bengal State Prisoners Regulation (III of 1818), the ex-Maharaja was required to stay at Kodaikanal and had been so staying since 1928. He was apparently kept under close supervision for some time, but after a few months this was relaxed. The Government of India however wanted "a watch to be maintained by the police at any railway station where the detenu is likely to entrain and steps to be taken to ensure his rearrest in the event of his absconding." He was also forbidden to be absent from his residence at night [Exhibit VII (*c*)]. By Exhibit VII, dated 24th August, 1928, the Inspector-General of Police, Madras, acting under instructions from the Government of Madras (to whom necessary directions had been conveyed by the Government of India) informed the District Superintendent of Police, Madura, of the Government's decision to restrict the movements of the ex-Maharaja of Nabha to the Kodaikanal municipal area. The same information was once again conveyed to the second defendant in June, 1936 [*vide* Exhibit VII (*a*)].

The appellant who had been staying with her husband at Kodaikanal desired to go to Madras early in 1937 and necessary arrangements were made by her Secretary (P.. W. 6, in the case) for reserving accommodation for her in the "Trivandrum Express" (a train proceeding to Madras from the south) on 13th January, 1937. That afternoon, the Station-House Officer at Kodaikanal, acting under the erroneous impression that the ex-Maharaja was arranging to proceed to Madras, sent a telegram (Exhibit IV) to the second defendant in the following terms : "Ex-Nabha Raja departuring to Madras Spencer Hotel with family in car M.D. 2037." This is said to have been received by the second defendant at Madura at 6-30 P.M. In view of the possibility of the ex-Maharaja having left Kodaikanal by that time, the second defendant decided to take steps to prevent his boarding the train at Kodaikanal Road railway station. The "Trivandrum Express" was timed to leave Madura at about 7 P.M. and to reach Kodaikanal Road a few minutes after 8 P.M. The second defendant accordingly gave a call on the telephone to the railway police staff at the Madura station platform and as the third defendant answered, the second defendant attempted to instruct him to proceed by that train to Kodaikanal Road and there prevent the ex-Maharaja boarding the train. To the details of this conversation we shall advert later. In all probability, the third defendant caught or understood the instructions only vaguely and indistinctly, as the platform was noisy and his knowledge of English very poor and he had to catch the train in a hurry as it was about to leave. During the journey between Madura and Kodaikanal Road, he saw that one of the compartments in the train had been

reserved for the Maharani of Nabha. Connecting this with the indistinct impressions that he had received from the telephone message at Madura, he seems to have made up his mind that the instructions given to him by the second defendant must have related to the Maharani. That he believed that the second defendant's instructions related to the Maharani and acted on that footing and did not intend to act in violation or in excess of those instructions is placed beyond doubt by the telegram, Exhibit O, which he sent to the second defendant, two hours later, from Kodaikanal Road. He there speaks of having "detained the Maharani as per the orders" of the second defendant.

When the train arrived at Kodaikanal Road, the third defendant informed P. W. 6, who was waiting on the platform, that he had instructions to prevent the Maharani boarding the train. She was at that time sitting in her car within the railway compound, expecting to be called to the train by her Secretary (P. W. 6) after her luggage had been placed in the compartment reserved for her. It is unnecessary to refer here to the details of the conversation that is said to have taken place between the third defendant and P. W. 6 or between P. W. 6 and the appellant. The train was delayed for a few minutes beyond the scheduled time, apparently as a result of this discussion. After it had left, the third defendant sent the telegram, Exhibit O, already referred to and its concluding words "advise as what to do" are significant in their bearing on the appellant's contention on the case of false imprisonment. On receipt of Exhibit O, the second defendant sent the reply telegram, Exhibit III, "Your orders were to detain Raja and not Maharani. Maharani may proceed anywhere and you should afford any assistance which the Maharani may require." By this time, the second defendant had been informed by a second telegram (Exhibit VI) sent by the Station-house Officer, Kodaikanal, that the ex-Maharaja had "returned on sending family." Exhibit III is said to have been received by the third defendant at Kodaikanal Road at 9-45 P.M. The appellant states that from the time of the arrival of the third defendant at Kodaikanal Road station till the time that this telegram was received, the only gate through which she and her car could have gone out of the railway station compound remained closed under the orders of the third defendant and that the fourth and fifth defendants had posted themselves at that gate with a view to prevent her egress. When the gate was opened, she left by car for Trichinopoly, about 85 miles further north, in a vain attempt to catch the Trivandrum Express at that station. The appellant claimed that the above acts of defendants two to five had no legal justification and that as they had led to a complete deprivation of her liberty for the time being, they constituted false imprisonment. She further claimed that the Government of Madras—whom she impleaded as the first defendant—was also liable for damages, since the other defendants had invaded her right to freedom in the course and as part of their official employment, alleging it to be within the scope of their official authority.

The defendants filed written statements, more or less on the same lines so far as the facts were concerned. As a matter of law, the first and second defendants stated that the plaintiffs had no cause of action against them. All the defendants denied that there had been anything in the nature of false imprisonment. They asserted that acting under the supposed order of the second defendant, the third defendant had only prevented the appellant boarding the train at Kodaikanal Road, that he never gave orders to defendants 4 and 5 to close the gate of the compound and that the gate was in fact not closed. It was added that except that the plaintiffs were prevented from going by that train, they were at absolute liberty to go anywhere they liked and that this was made clear to them even in the first instance. Defendants 4 and 5 also denied that they closed the gate or were ordered by the third defendant to close the gate. A plea that the suit was not maintainable without the sanction of the Provincial Government under section 270 (1) of the Government of India Act, 1935, and a further plea of limitation, either under article 2 of the Limitation Act or under section 53 of the Madras District Police Act, were also taken. It is unnecessary to refer to the other pleas.

The trial Court as well as the High Court accepted the appellant's version of the incident as substantially true, including the allegation that the gate of the railway compound within which the appellant was staying in her car was closed under the orders of the third defendant and that defendants 4 and 5 posted themselves there under his orders. Without repeating the reasons given in their judgments, we may say we concur in this finding. The learned Subordinate Judge further held that in view of the attitude and declarations of the third defendant, these acts amounted to false imprisonment, but the learned Judges of the High Court thought otherwise. They say " the first plaintiff must have thought that she was confined within the railway fencing where her car was standing and would not be permitted to leave it, if she tried so to do. . . . . that must have been her feeling from the subjective point of view ; but that would not be enough for us to hold that she was actually confined or imprisoned and not merely restrained from proceeding by the Trivandrum Express. Had there been proof on the record that there was total restraint of the first plaintiff's movements or liberty during the period that she was in her car by the use of threat of force or by confinement, she could be said to have been imprisoned." If it were necessary to decide this question, we should have hesitated to concur in this opinion of the learned Judges of the High Court. On the questions of law, both courts have held that the plaintiffs had no cause of action against defendants 1 and 2 and that the suit was not maintainable against defendants 2 to 5 without the sanction of the Provincial Government under section 270 (1) of the Constitution Act. The learned Judges of the High Court also held that the suit was barred by article 2 of the Indian Limitation Act and section 53 of the Madras District Police Act, as it had not been instituted within three months of the incident. They granted a certificate under section 205 of the Constitution Act, on the ground that the case involved a substantial question of law as to the interpretation of section 270 (1) of the Act. Hence this appeal.

The case against defendants 1 and 2 can be briefly disposed of. The learned Judges of the High Court based their decision in favour of the first defendant on two grounds : (1) that defendants 2 to 5 acted in exercise of their " statutory power " and that in such circumstances a person aggrieved by their acts could have no claim against the Government, and (2) that the State could not be held liable for the improper conduct of public servants unless those acts had been done under the orders of the Government or had been subsequently adopted and ratified by it. They also referred to a line of cases in India distinguishing between claims against the Government on the basis of contracts or other business transactions entered into by public servants on behalf of the Government and claims in respect of tortious acts committed in the discharge of governmental functions as a sovereign. There are obvious difficulties in this case in accepting the view that defendants 2 to 5 were discharging a " statutory duty " in their dealings with the appellant. As we however agree with the learned Judges as to the other ground of their decision in favour of the first defendant, it is unnecessary to discuss this aspect of their decision.

As regards the second defendant also, we must hold that the plaintiffs have not made out any ground to make him legally liable. We cannot however help feeling that on his own statement that it was not easy to make the third defendant understand his instructions, the second defendant would have done better to have taken greater care to make his instructions clear and specific. Some questions in the course of the evidence and some discussion in the judgments in the Courts in Madras have been directed to the ascertainment of the exact words used by the second defendant in giving instructions to the third defendant. He naturally said that he was unable to recall the exact words used by him and we are unable to hold that the third defendant spoke the truth when he said that the second defendant specifically referred to the Maharani as the person whom he was to prevent from proceeding to Madras. Two of the disputed matters are (*i*) whether the second defendant instructed the third defendant to *detain* anybody or merely to *prevent* him from boarding the train, and (*ii*) whether he used the singular, referring only

to the ex-Maharaja or used the plural so as to include in his direction the ex-Maharaja's party as well. In view of the possibilities of legal arguments that were raised by the pleadings in the case as to what could constitute "false imprisonment," the third defendant, instead of pleading failure of memory, insisted that only the word "prevent" was used. But the learned Judges of the High Court have rightly attached some importance to the wording of the telegram (Exhibit O) which the Sub-Inspector sent a few hours later from Kodaikanal Road to the second defendant at Madura. He there reports that he "detained Maharani of Nabha from going by six as per your orders." On his own evidence, the third defendant was not very well conversant with English and it is quite likely that he was repeating the word "detain" as he heard it on the telephone on the Madura platform. The language of the instructions is even more important with reference to the person or persons asked to be dealt with. The second defendant is positive that he mentioned only the ex-Maharaja, but he cannot say whether he added anything like "only" or "alone." It is common ground between him and the third defendant that the third defendant had some difficulty in hearing the second defendant's instructions on the telephone. The second defendant admittedly referred to the "party" or "family" of the ex-Maharaja as among those intending to proceed to Madras, and if he had not definitely instructed that *only* the ex-Maharaja was to be prevented from proceeding, it would be no wonder if a person of the third defendant's standing had understood that members of the "party" or "family" were to be likewise prevented, whether the ex-Maharaja was with them or not.

It does not however seem so easy to exonerate the third defendant from legal liability. As observed by the High Court, the third defendant cannot rely upon section 54 of the Criminal Procedure Code, because the appellant was not charged with or suspected of any offence and there was no requisition to the third defendant specifying any offence or other cause against the appellant, so as to make it appear to him that the appellant might lawfully be arrested without a warrant even by the second defendant. Clause (9) of section 54 throws a certain measure of responsibility even on the officer to whom the requisition is addressed. We doubt if the third defendant can take shelter even under section 21 of the District Police Act, 1859, because that section only commands obedience to and execution of orders and warrants *lawfully* issued. In this case there was, in fact, no order or warrant to detain the appellant and none such could have been lawfully issued. It is however unnecessary for us to decide this question, in view of the conclusion that we have come to on the plea raised under section 270 (1) of the Constitution Act.

It was argued on behalf of the appellant that the third defendant could not claim the benefit of section 270 (1) as his acts could not be brought within the description "done or purporting to be done in the execution of his duty as a servant of the Crown." It was also contended that as the third defendant falsely denied having done anything beyond preventing the appellant from boarding the train at Kodaikanal Road, he should not, now that he is found to have gone much farther and improperly detained the appellant within the station compound by getting defendants 4 and 5 to close the gate, be allowed the benefit of a plea under section 270 (1) in respect of this latter act, as he did not claim it in the written statement. It was said that on his own evidence that he was only asked to "prevent" the appellant from boarding the train at Kodaikanal Road, his acts, in so far as they went further, were clearly in wanton excess of his duty and that such conduct was not protected by section 270 (1). It was lastly contended that if the instructions given by the second defendant related only to the ex-Maharaja, it could not be held that the third defendant was acting in the execution of his duty in detaining the appellant. On the other side, the Advocate-General pointed out that the plaintiffs themselves had alleged in paras. 7 and 17 of the plaint that the acts of defendants 2 to 5 "were purported to be done in their official capacity and in the course, and as part, of their official employment and alleged to be within the scope of their official authority" and he contended that it was not now open to the plaintiffs to say that the acts complained of were not acts done or purporting to be done by

defendants 2 to 5 in the execution of their duty as servants of the Crown. Whatever might have been the position, if the case had been argued on demurrer, before the evidence had been led, we do not feel that it would be proper at this stage to deal with the question as one to be decided merely on the pleadings. The passage relied on by the Advocate-General from the opinion of Lord Macmillan in *R. & W. Paul, Ltd.* v. *The Wheat Commission*[1] does not seem to treat the allegations in the plaint as concluding the plaintiffs, but only as supporting the conclusion which the House was inclined to come to on the facts. Likewise, we have to deal with the plea of the defendants under section 270 (1) as a general plea to the whole case of the plaintiffs and to consider whether even on the facts, as we find them, the action of the defendants can be regarded as taken or purporting to be taken in the execution of their duty as servants of the Crown.

Assuming that the acts complained of cannot be regarded as done by defendants 3 to 5 in the execution of their duty, there still remains the other alternative, namely, whether they *purported* to be so done. The word "purporting" would be rendered nugatory if the section were to be limited to acts justified or authorised by law. (Cf. *Wilson* v. *Nathmull*[2]; see also *Dicker* v. *Angerstein*[3].) The interpretation of this provision was discussed at some length in the judgments delivered in *Hori Ram Singh* v. *The Crown*[4]. As observed by one of us there, the question is substantially one of fact to be determined with reference to the nature of the act complained of and the attendant circumstances. English decisions construing similar language in a provision in the Public Authorities Protection Act, 1893, make it clear that the benefit of that statute can be claimed even by an officer who has acted under a mistaken view as to his duty, whether the mistake be one of fact or one of law, if only he honestly believed that he was acting in the discharge of his duty. (See *Newell* v. *Starkie*[5]; *Scammell, etc.* v. *Hurley*[6] and *Selmes* v. *Judge*[7].) In *Betts* v. *Receiver for the Metropolitan Police District and Carter Peterson and Co.*[8], Du Parcq, J., expressed a doubt "whether the Act protects a public officer who, while rightly apprehending the facts, takes a mistaken view as to his legal obligations, and executes or intends to execute some function which he has no duty to execute." It is unnecessary in the view that we take on the facts of this case to determine whether section 270 (1) will also include cases of officers acting under a mistaken view of law as to their duty. The language of the English statute is not identical with that employed in section 270 (1) of the Constitution Act, but we think that the principle of the cases above referred to, in so far as they extend the statutory protection even to officers acting under a mistaken view as to their duty, is equally applicable here. It is true that section 270 (1) of the Constitution Act goes much farther than the Public Authorities Protection Act, in that the former places an aggrieved person at the mercy of the executive government before he can institute a suit even in a civil Court in respect of an alleged misconduct of a public servant, whereas the English Act only provides for a shorter period of limitation and for previous notice to the public officer. But this does not relieve the Court of its duty of giving due effect to the terms of the statutory provision.

We have already held that the third defendant must have believed, however mistaken this belief was, that the second defendant had instructed him to detain the appellant. It is clear from his conduct that he also honestly thought that it was his duty to obey those instructions. It was argued on behalf of the appellant that, when, as the evidence shows, the third defendant declined to accede to the request of P. W. 6 to wire to the second defendant, even while the train was at the Kodaikanal Road Station, so as to get definite instructions from the second defendant, he must be taken to have acted maliciously, so as to disentitle him to the benefit of section 270 (1). The English cases no doubt deny the benefit of the Public Authorities Protection Act to officers who act maliciously or only in "pretended"

1. (1937) A.C. 139 at 161.
2. (1929) 59 M.L.J. 501 : A.I.R. 1930 Mad. 458 at 464.
3. (1876) 3 Ch. D. 600.
4. (1939) F.C.R. 159.
5. (1919) 89 L.J. P.C. 1.
6. (1929) 1 K.B. 419.
7. (1871) 6 Q.B. 724.
8. (1932) 2 K.B. 595 at 602.

execution of their duty. It is unnecessary to decide in this case whether the same principle would govern the interpretation of section 270 (1) of the Constitution Act, because we agree with the learned Judges of the High Court that the conduct of the third defendant could not be held to have been malicious or *mala fide*. In the witness box, he denied that P. W. 6 made any request to him to the above effect and he suggested that he was only asked if the appellant could go back to Kodaikanal and he relpied that she was free to do so. We are unable to believe this version. As the subsequent conduct of the appellant showed, she was eager to go to Madras and it was only natural that, in that situation, the Private Secretary would have asked the third defendant to obtain definite instructions from the second defendant, especially when there was good reason to think that there could have been no order against the appellant and that there must be some mistake somewhere. The attitude of the third defendant to that request was only what is usual with most police officers when they imagine that they are carrying out orders and though he has added to his difficulties by his statements from the witness box we think it would be too much to read into his conduct at the time anything like malice or want of good faith.

A further contention was urged that the third defendant who belonged to the railway police was under no duty to obey the orders of the second defendant who belonged to the District Police and that therefore the third defendant could not be held to have acted in execution or purported execution of his duty. This contention has, in our opinion no substance. The third defendant stated from the witness box that though orders are generally communicated to the officers of the Railway Police through their own Superintendent, the District Superintendent of Police issues orders directly to the subordinate officers of the Railway Police when a matter is urgent and that the fact of his having issued such orders is merely communicated to the Superintendent of Railway Police. The second defendant and D. W. 7, the Deputy Inspector-General of Police, were examined some days later and no question was put to them in cross-examination to suggest that such was not the practice or the true legal position. Indeed, the practice seems quite natural and probable in view of the scheme of the Police Act and the rules framed thereunder. Though for purposes of administrative convenience, the Railway Police is classified as a separate unit, it forms part of one and the same general police force with the District Police, and the Police Manual suggests that there should be full and complete co-operation between the two sections of the force. The third defendant is accordngly entitled to claim that the suit is not maintainable without the sanction of the Provincial Government. So far as defendants 4 and 5 are concerned, their case clearly falls within section 270 (1).

The appeal must fail on the grounds so far dealt with and it is not necessary to consider the plea of limitation. We wish to guard ourselves against being understood as concurring in the view of the High Court that the suit is barred either by article 2 of the Limitation Act or section 53 of the Police Act.

There is one episode which at this stage has no bearing on the decision of the case, but which, we think, requires a passing notice, as the learned Judges of the High Court have commented on it. Referring to a letter of apology (Exhibit R) sent to the appellant by the Deputy Inspector-General of Police, the learned Judges expressed regret " that due advantage was not taken of the Government's gesture of goodwill." If this observation was intended to imply any appreciation of the attitude of the Government or any blameworthiness on the part of the appellant in that connection, we are unable to concur in it. The second defendant no doubt had the courtesy to write a letter of apology (Exhibit VIII) on the 21st of January, 1937. But he unfortunately thought fit to address the letter in terms which the appellant had been protesting against for at least two years before and the result was that the letter returned to the second defendant with the envelope unopened. There is thus nothing to show that the appellant was aware of this apology. Notice under section 80 of the Civil Procedure Code of the intended suit was given to and

received by the Government of Madras in the last week of January and all that appears in the evidence is that early in February the authorities busied themselves with collecting evidence for the suit. (See Exhibits I and II and the cross-examination of D. W. 5 as to his having asked the Deputy Superintendent of Police to make an enquiry and report.) It is true that Exhibit R was sent by the Deputy Inspector-General of Police; but this was on August 18, 1937, that is, nearly two months after summons in the suit had been served on the Government. When it came to defending the suit, the defendants contended that the suit should have been filed within three months of the incident, but it took more than six months after the incident to send this letter of apology. The averments in para. 19 of the first defendant's written statement would seem to deprive this letter of apology of even such little grace as it might otherwise have possessed. It was probably sent under legal advice, with a view to found a plea on the provisions of section 53 of the District Police Act which says that no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought or if a sufficient sum of money shall have been paid into Court after such action brought. That this must have been the object of the letter is shown by the defendant's insistence on raising this question by the 8th issue in the case. As we have already said, this is however only by the way.

We have carefully considered the question of costs in this appeal. Both in the trial Court and in the High Court, the parties have been directed to bear their own costs. We are however unable to follow the same course here. Whatever might be the grievance of the appellant, her case had been fully considered and examined by two Courts and both of them had concurrently held that the suit was not maintainable. Any further attempt to agitate the question could be made by the appellant only at her own risk and subject to the usual obligations of a litigant who fails in his appeal. The appellants must accordingly pay the respondent's costs of this appeal, only one set.

*Zafrulla Khan, J.*—As I have the misfortune to dissent from the view taken by my Lord and my learned brother on the question whether the provisions of section 270 (1) of the Constitution Act operate as a bar to the maintainability of the suit against defendants 3 to 5, I am under the necessity of stating the grounds of my dissent somewhat fully.

The pleadings reveal a good deal of difference between the parties regarding the facts. It is therefore necessary to set out the facts as established by the evidence. At the outset it may be observed that the appellant's late husband never left his house on the afternoon of 13th January, 1937, when the appellant left for Kodaikanal Road station. There was thus no justification for the telegram sent by the Station-house Officer to the second defendant announcing that the ex-Maharaja had left for Madras (Exhibit IV), and the whole train of unfortunate incidents that followed resulted from a misapprehension which could easily have been cleared up by the exercise of a little care by the subordinate police officers at Kodaikanal.

The main controversy between the parties centred round what occurred at the railway station on the arrival of the Trivandrum Express. The third defendant stopped the appellant's Private Secretary (P. W. 6) from putting her baggage in the compartment reserved for her and informed him that he had orders to prevent the appellant from boarding the train and to detain her. P.W. 6 told him that they had received no such order and wanted to know whether there was any order in writing. The third defendant replied that he had received oral orders over the telephone. P. W. 6 then asked him to put down his own order in writing so that he could show it to the appellant. This the third defendant declined to do. P. W. 6 then went to the appellant who was waiting in her car in the station compound and told her what had happened. She asked him to clear the matter up with the District Superintendent of Police by getting a telegram despatched to him and to somehow arrange for her to travel by the Express. In the meantime, the third defendant had directed the fourth and fifth defendants to close and guard the

gate which afforded the only egress from the station compound and they carried out the direction. P. W. 6 asked the third defendant to send a telegram to the District Superintendent of Police as it was possible that a mistake had been made, and told him that the station master (P. W. 4) would be requested to detain the train for a short time to enable the appellant to travel by it on receipt of a reply from the District Superintendent. The request was supported by the station master who offered to try to obtain the Controller's orders for the detention of the train. The third defendant declined to move in the matter on the ground that his orders were definite. After the departure of the train, P. W. 6, asked him to permit the gate to be opened so that they could now make a move. To this he replied that the appellant having been detained under the orders of the District Superintendent, she could not be allowed to move till further orders were received from that officer. P. Ws. 4 and 5 suggested that he might obtain further orders by telegram. . He then despatched the telegram (Exhibit O) to the second defendant, a quarter of an hour after the departure of the train. The reply (Exhibit III) was received an hour later and thereupon he informed the appellant that she was now free to go anywhere she liked.

That the appellant was wrongfully confined by defendants 3 to 5 can on these facts admit of no doubt whatever. On behalf of the respondents no legal justification or excuse was sought to be urged before us for the wrongful confinement. Counsel for the respondents admitted that if the bar created by section 270 (1) of the Constitution Act could not be availed of by defendants 3 to 5, the appellant would be entitled to recover against them. Section 270 (1) of the Constitution Act provides that no proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India before the relevant date, except with the consent of the Governor-General or the Governor of the Province as the case may be. Much argument was addressed to us on the exact meaning of the words " act purporting to be done in the execution of his duty as a servant of the Crown." I find myself in entire agreement with the majority of the Court that the question is substantially one of fact to be determined with reference to the nature of the act complained of and the attendant circumstances. They go on, however, to express the view that the words are wide enough to cover the case of an officer who has acted under a mistaken view as to his duty, whether the mistake be one of fact or one of law, if only he honestly believed that he was acting in the discharge of his duty.

I feel considerable hesitation in subscribing to that proposition without qualification, as with all respect I consider that if interpreted literally it would be found to state the principle too widely. A Superintendent of Police might direct a sub-inspector to take a couple of constables with him and arrest and produce before him *X*, a perfectly peaceful and law-abiding citizen, whom he proposed to interrogate in order to obtain information which might be useful to him for some private or public purpose, but without disclosing to the sub-inspector any ground that would justify *X's* arrest. If the sub-inspector and the constables proceeded to execute these orders, it might be argued on their behalf that they had honestly believed that they were acting in the discharge of their duty. That the matter might be further complicated by their arresting *Y*, honestly believing that the orders related to him rather than to *X*, might in their eyes make no difference to the case. I cannot bring myself to believe that Parliament in enacting section 270 (1) had in mind a case of this kind which in its essentials is not distinguishable from the case before us. If this section or other similar enactments are held to cover cases like these, the result would be that whatever may be the position with regard to a superior officer issuing an unlawful order, his subordinates executing such an order could always take shelter behind such provisions, a state of affairs which would amount to putting a premium upon official high-handedness and would reduce the rights of the subject to security of life and limb, liberty and the peaceful enjoyment of property to a mockery. A line must be drawn somewhere and it is not suggested by the majority where it should be drawn.

We are in this case concerned only with a mistake of fact. The second defendant asked the third defendant to proceed to Kodaikanal Road station and prevent the ex-Maharaja from boarding the Trivandrum Express. On the basis of the information which the second defendant had received, this was a perfectly lawful order and was well within the authority of the second defendant. Though the second defendant was satisfied that the third defendant had understood his directions correctly (lines 7 and 8, page 78 of the Record) the third defendant somehow imagined that the person who was to be prevented from boarding the Express was the appellant. Had the third defendant made no mistake in interpreting the directions of the second defendant, and on arrival at Kodaikanal Road station his inquiries had led him honestly to believe that a certain person present at the platform and seeking to board the train was the ex-Maharaja, and had he proceeded to prevent that person from boarding the train, and it had subsequently transpired that that person was not the ex-Maharaja but somebody else, there might perhaps have been force in the contention that the third defendant's act fell within the purview of section 270 (1), as an act purporting to be done in the execution of his duty. In this case a mistake occurred not in the execution of what the third defendant had correctly understood to be his duty, but in his imagining that a direction had been issued concerning *Y*, when in fact it had been issued concerning *X*. I venture to think that the correet rule in cases of mistake of fact would be that for the purpose of determining whether an act done *bona fide* in pursuance of a mistake of fact would be covered by the sub-section, the true state of affairs must be deemed to have been what it was mistakenly supposed to be. That is to say, in order to determine whether the language of the sub-section applies to the case of defendants 3 to 5, it must be assumed that the second defendant had in fact directed the third defendant to prevent the appellant from boarding the train. The effect of the mistake, under which it is alleged the third defendant was labouring, cannot be stretched further to bring his acts and those of defendants 4 and 5 within the ambit of the sub-section. What then is the position ? Nobody had any lawful authority to direct that the appellant should be prevented from boarding this particular train or indeed from travelling by any other train or means which she might choose to travel by. That being so, there could be no basis for any assumption on the part of the third defendant that he had any lawful authority to prevent the appellant from boarding the train. He must be presumed to possess some knowledge of the duties and authority of a police officer. On no construction which he could reasonably place upon the limits of his lawful authority could he assume that he had authority to restrain the appellant from boarding the train. Nor was there anything in what the second defendant is alleged to have communicated to him, which could have led him to believe that the second defendant himself had any authority to interfere with the movements of the appellant. Therefore, even if the defendants 3 to 5 had done nothing more than prevent the appellant from boarding the train, I would have been reluctant to hold that under the circumstances of this case their acts were covered by the language of section 270 (1) of the Constitution Act.

But the matter does not rest there. The second defendant is quite clear and emphatic that his direction was only to prevent the person concerned from boarding the train. The third defendant does not allege any mistake or misunderstanding with regard to this part of the direction. He stated at the trial (line 23, page 69 of the Record) : "I understood the District Superintendent of Police's phone at Madura to mean that I should prevent the Maharani from going by train. I did not understand it to mean that I should prevent her from going by car and boarding at any railway station further off." Nothing could be clearer. His case throughout has been that he clearly understood that the direction given to him was merely to prevent the lady from boarding the train. If nevertheless he along with defendants 4 and 5 proceeded to wrongfully confine her, surely it cannot be urged on their behalf that their acts in this connection purported to be done in the execution of their duty.

It was suggested that the language of Exhibit O, the telegram which the third defendant despatched to the second defendant after the departure of the train,

indicated that the direction given to him was to detain the Maharani. I do not think it would be justifiable to pick out that word from the telegram and attach to it its primary connotation. The word was used by the third defendant to describe something that was in his mind and he alone was in a position to explain what he had meant by it. His explanation is this : "The District Superintendent of Police used the word 'prevent.' In Exhibit O, I used the word 'detained.' That was because I thought both words meant the same thing." (Lines 40 to 52, page 69 of the Record.) Again, "The word 'detained' in Exhibit O, means only prevented from going by train. I did not mean by it that I prevented the Maharani from going anywhere or detained her in a place. In that case I would have stated I arrested her." (Lines 30 to 35, page 67 of the Record.) To a person of the little education of the third defendant, "detain" might signify only stop or prevent.

The position therefore is that the second defendant asked the third defendant to prevent the ex-Maharaja from boarding the train. By the time the third defendant arrived at the station, he began to imagine that the direction given was to prevent the appellant from boarding the train. This direction, if it had in fact been given by the second defendant would have been neither lawful nor justified but was in any case limited to prevention from boarding the train. It was so understood by the third defendant. Assuming that if defendants 3 to 5 had done no more than prevent the appellant from boarding the train their acts would have been covered by the language of section 270 (1), what justification would there be for holding that the section would also cover their entirely unauthorised and high-handed action in wrongfully confining her? It was argued that the fact that defendants 3 to 5 had falsely denied the wrongful confinement, should not operate to deprive them of the benefit of section 270 (1), if the Court came to the conclusion that though the appellant was wrongfully confined, the third defendant did honestly believe that the direction given to him by the second defendant was to confine her. But did the third defendant honestly hold that belief and could the Court so find? The question whether the appellant was or was not wrongfully confined is one, if I may say so, of external visible fact, which has to be determined on the evidence of the eye-witnesses. The questions, what was the direction given by the second defendant, and what was it understood to be by the third defendant, are no doubt equally questions of fact, but the second relates to the state of mind of the third defendant upon which the primary and the best evidence can only be that of the third defendant himself. True it is that help could also be sought from inferences that might be drawn from his conduct, but even that conduct, so far as it relates to the despatch of Exhibit O, has been explained by him consistently with his direct evidence. Nor does it appear to me to follow that if his denial of wrongful confinement was false, his explanation of what he understood he had been directed to do must also be false. If I were to attempt to make a reading of the working of the third defendant's mind, the picture would be somewhat like this : He understood the second defendant to say that the ex-Maharaja and his party were proceeding to Kodaikanal Road station and that he was to prevent the ex-Maharaja from boarding the Trivandrum Express. During his journey from Madura to Kodaikanal Road, he noticed at an intermediate stop that a first class compartment had been reserved for the use of the appellant. On arrival at Kodaikanal Road he discovered that it was the appellant who was proposing to travel by that train and not the ex-Maharaja. He then imagined that perhaps his instructions were to stop the appellant from travelling by that train, as it would in his then state of knowledge appear to him absurd to have been told to stop the ex-Maharaja who was nowhere near the scene. Being clothed with a little authority he arrogated to himself a great deal more, as is unfortunately often the case in this country, and not merely prevented the appellant from boarding the train, but proceeded wrongfully to confine her in the compound of the station for two hours. Knowing that he had no authority for such action and never intending to admit that he had so acted, when the matter came to the notice of his superiors, he not only denied the wrongful confinement himself but also persuaded defendants 4 and 5 to deny it,

The wrongful confinement is denied not only in the written statements of defendants 3 to 5, but also in the written statements of defendants 1 and 2. This can be explained only on the hypothesis that the third defendant had done something that he knew was no part of his duty, was indeed unlawful and high-handed, and the doing of which he dared not admit to his official superiors. This conclusion is strengthened by the refusal of the third defendant when requested so to do to furnish P. W. 6 with a written order directing the appellant to refrain from travelling by the Trivandrum Express and not to move out of the station compound, which incidentally would have put the question of the nature and scope of the directions given to him by the second defendant beyond doubt.

This is not conjecture. It is a more legitimate inference from the evidence and the conduct of the third defendant than the inference that though the second defendant swears that he asked the third defendant only to prevent the person concerned from catching the train, he has grossly perjured himself having in fact asked the third defendant to " detain ", that is, to confine that person, and that though the third defendant swears that he understood that he was only to prevent the appellant from catching the train, he has equally perjured himself having in fact understood that he was to put her in confinement. In any case, it was for the third defendant to establish that the direction given to him was to detain, that is, to confine, the appellant, or at least that he so understood or interpreted the direction. In the face of the sworn denial of the second defendant that he gave any such direction, and of the third defendant himself that he received any such direction, I do not conceive it to be any part of my duty to make out a contrary case on their behalf. On this finding it is not possible to hold that the acts of defendant 3 are covered by the language of section 270 (1) of the Constitution Act. His order to defendants 4 and 5 to close the gate of the station compound and to mount guard on it was manifestly unlawful and without any authority. In carrying out that order they could not be held to be acting or to be purporting to act in the execution of their duty as servants of the Crown. Section 270 (1) would afford as little protection to them as to defendant 3.

It was conceded on behalf of the respondents that if section 270 (1) was not applicable to the case, the suit would not be barred by limitation, either under article 2 of the First Schedule of the Limitation Act, or by virtue of the provisions of section 53 of the Madras District Police Act.

On the quantum of damages, the appellant's counsel did not ask us for any higher sum than that assessed by the trial Court, namely, Rs. 5,000. This was not contested on behalf of the respondents.

In my opinion the appellant is entitled to a decree against defendants 3 to 5 for Rs. 5,000 with proportionate costs throughout. But as the majority of the Court have taken a different view, the order of the Court will be as they have proposed.

V.S. ——— *Appeal dismissed.*

## [THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Patna.)

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMMAD ZAFRULLA KHAN, JJ.

Sahdeo Gosain and another .. *Appellants**

*v.*

The King-Emperor .. *Respondent.*

*Criminal Procedure Code (V of 1898), sections 162 and 164—Statements made to police—Limits to the use of—Value of testimony of identifying witness at the trial who had failed to mention name of accused in statement recorded under section 164—Effect of absence of corroboration in the case of the testimony of unreliable witnesses.*

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* Criminal Appeal No. 1 of 1944. 6th March, 1944.

Under the provisions of section 162, Criminal Procedure Code, a statement made to the police during the course of the investigation can be used only for the purpose of contradicting a prosecution witness and cannot be used for any other purpose like corroboration.

The failure of an identifying witness to mention an accused's name in his statement recorded under section 164, Criminal Procedure Code, robs his subsequent statement against that accused made at the trial some months later of all value.

It was found by the High Court that the testimony of neither of the only two identifying witnesses could be implicitly relied upon and that it would not be safe to maintain the convictions, except where the testimony of one of these witnesses was corroborated by that of the other. Where on an examination of the evidence by the Federal Court it was found that all that was left against the accused was only the uncorroborated testimony of one of such witnesses,

*Held*, that on the criterion adopted by the High Court with regard to the reliability of the prosecution evidence in the case, the accused were entitled to an acquittal.

*Bhabananda Mukerjee* (instructed by *Sumair Chand Jain Raizada*, Agent) for Appellants.

*Mehdi Imam* (instructed by *S. P. Varma*, Agent) for Respondent.

The Judgment of the Court was delivered by

*Zafrulla Khan, J.*—On the 14th August, 1942, a large crowd raided the Ghogha railway station on the East Indian Railway, burnt the records and destroyed or damaged the furniture and telephone equipment. Ten persons were put on trial in respect of this occurrence before the Special Judge, Bhagalpur, under Ordinance No. II of 1942. Eight of them were convicted and were sentenced to various terms of imprisonment. Seven of the convicts, including the two appellants before us, preferred appeals to the High Court at Patna. The appeals of five of the convicts were allowed and they were acquitted. The two appellants, whose appeals were dismissed by the High Court, have further appealed to this Court on a certificate under section 205 of the Constitution Act.

The constitutional questions raised in the appeal are concluded by our judgment in *Piare Dusadh* v. *King-Emperor*[1].

On the merits, it was contended that on the criterion adopted by the High Court with regard to the reliability of the prosecution evidence in the case, the appellants are entitled to an acquittal. Of the nine witnesses examined on behalf of the prosecution with reference to the occurrence itself, only two, P. W. 1 and P. W. 3, were able to identify any of the accused persons at the trial. The High Court found, however, that the testimony of neither of these two witnesses could be implicitly relied upon, and that it would not be safe to maintain the convictions, except where the testimony of one of these witnesses was corroborated by that of the other. This test the High Court thought was satisfied in the case of the two appellants before us, Sahdeo Gosain and Sitaram Gosain, and their convictions were accordingly confirmed.

As regards Sahdeo Gosain, it was pointed out that P. W. 3 had not named him in his evidence at the trial as a person already known to him who had participated in the riot, but had merely picked him out as one of the rioters while identifying those accused persons in the dock whom he had already named in his evidence as participants in the riot. It was urged that as P. W. 3 had not identified Sahdeo Gosain at any test identification parade, his pointing him out in the dock as one of the rioters was of no value even as corroborative evidence of what P. W. 1 might have stated against him. The learned Judges of the High Court were of the opinion that the memorandum of the evidence of P. W. 3 made by the Special Judge was not clear as to whether the witness had named Sahdeo Gosain or had merely identified in the dock by sight. We are unable to appreciate the difficulty experienced by the learned Judges, as the memorandum appears to us to be perfectly clear on the point. The witness named four of the accused persons as those whom during the course of the riot he had identified among the rioters. He stated that they were present in the dock and then proceeded to the dock to identify them. The

1. (1943) 6 F.L.J. 187 : (1944) 1 M.L.J. 305 (F.C.).

memorandum then records, " Witness picks out Sahdeo and says that he saw this accused also in the mob." This can only mean that while identifying the accused persons whom the witness had already named, he pointed to Sahdeo and said that he had also been among the rioters. There is nothing else in the memorandum which casts any doubt on this matter. As against Sahdeo therefore the evidence of this witness is of no value whatever.

Our attention was also invited to the evidence of P. W. 4, the station master at Ghogha. He stated that he had witnessed all the incidents of the riot but was unable to identify anyone, as he was a new man in the locality. In cross-examination he admitted that he knew Sahdeo Gosain by sight, as he kept a shop near the station, though he did not know his name. As this witness did not state that he had seen Sahdeo Gosain among the rioters, the doubt with regard to this appellant's complicity in the riot is further strengthened.

As regards Sitaram Gosain, it was urged that though P. W. 1 did mention his name at the trial as one of the rioters, he had not mentioned his name in his statement recorded under section 164 of the Criminal Procedure Code on 18th August, 1942, only four days after the occurrence. On this point all that the learned Judges of the High Court have observed is, " As regards Sitaram Gosain the criticism is that though prosecution witness No. 1 has named him in Court he did not name him in his examination before the Magistrate under section 164 of the Criminal Procedure Code, though the accused have brought it out in cross-examination of the investigating officer that Sitaram had been named by P. W. 1 before the police." It was argued on behalf of the Crown that the last part of this sentence disposes of the criticism set out in the first part. We are by no means certain that that is so. The learned Judges do not even state whether the statement made by P. W. 1 to the police was before or after his examination under section 164, Criminal Procedure Code, much less as to how the fact that he had named Sitaram Gosain before the police explains his failure to mention his name before the Magistrate. Both statements appear to have been recorded on the same day, but there is no material on the record which would enable us to determine which was made first. Besides, under the provisions of section 162 of the Criminal Procedure Code, a statement made to the police during the course of the investigation can be used only for the purpose of contradicting a prosecution witness and except in that connection cannot be used for any other purpose.

We have examined the statement of P. W. 1 recorded under section 164 of the Criminal Procedure Code, and find that it relates to the incidents of the 14th August as well as to certain incidents of the 15th August. In connection with both these occurrences, the witness mentioned the names of the same eight persons whom he had identified on each occasion and he mentioned them in the same order. The statement is a detailed one and its examination leaves no doubt in our minds that the omission of Sitaram's name was not a slip of memory on the part of the witness. It was suggested on behalf of the appellants that his statement to the police was made after his statement to the Magistrate and that Sitaram's name may have been introduced in it in answer to leading questions put to him by the investigating officer. Be that as it may, the failure of the witness to mention Sitaram's name in his statement to the Magistrate robs his subsequent statement against Sitaram made at the trial nearly four months later of all value.

This leaves against each of the appellants only the uncorroborated testimony of one witness, which in the circumstances of this case, the learned Judges of the High Court were not prepared to regard as sufficient to support a conviction. We are satisfied that the complicity of neither of the appellants in the incidents of the 14th August, 1942, has been established beyond reasonable doubt.

We allow their appeal and declare that in place of the order of the High Court there shall be substituted an order directing their acquittal and immediate release.

V. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Koothakkode Vilakkathala Vadekke Pathayappura Veettil Vellachi *alias* Kuppu Amma and another .. *Appellants**

*v.*

Gopalan Nair .. *Respondent.*

*Malabar Law—Tavazhi—Separation of members—Share allotted to mother and son—Presumption as to jointness—Alienation by mother of her share—Validity.*

The members of a Malabar tarwad entered into a partition agreement under which the tarwad property was divided into four lots, one of which fell to the share of the mother, the first plaintiff and her son the defendant. The first plaintiff had three daughters and a son but the daughters separated themselves from their mother and entered into the other groups. After the partition the first plaintiff transferred her interest in the property that fell to the share of herself and the defendant to the second plaintiff, one of her divided daughters. The question was raised whether it was permissible for the mother and the son to hold the property jointly and if the defendant was entitled to oppose the transfer of his mother's share to the second plaintiff.

*Held*, that assuming that the first plaintiff and the second defendant remained joint after the disruption of the *tavazhi*, the former could claim a division of the property and her share could be claimed by the second plaintiff as transferee.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in A. S. No. 53 of 1942, preferred against the decree of the Court of the District Munsiff of Palghat in O. S. No. 244 of 1941.

*K. Kuttikrishna Menon* and *A. Gopalakrishnan* for Appellants.

*P. Govinda Menon* for Respondent.

The Court delivered the following

JUDGMENT.—Members of a tarwad entered into a rather unusual partition agreement under which the tarwad property was divided into four lots. The one with which we are concerned fell to the share of a mother, the first plaintiff, and her son, the defendant. The first plaintiff had three daughters and a son; but the daughters separated themselves from their mother and entered into the other groups. After the partition, the first plaintiff transferred her interest in the property that fell to the share of herself and the defendant, to the second plaintiff, one of her divided daughters. The question for decision in the Courts below was whether it was permissible for the mother and the son to hold the property jointly. If so, then it was presumed that they could not divide the property and that the defendant was entitled to oppose the transfer of his mother's share to the second plaintiff. This appeal has been filed by the plaintiffs.

Much of the argument of the learned counsel for the appellants is based on *Mothiyan Kutti* v. *Ayissa*[1], followed in *Ramunni Kidav* v. *Kunhayan*[2], in which it was held that if property was given to certain members of a tavazhi, they could not hold it as a tavazhi. In *Muthiyan Kutti* v. *Ayissa*[1], a man gave property to his wife and her children by him and directed that the property should be held by them as a tavazhi. In fact, they did not constitute a tavazhi; for the wife had children by another husband. The learned Judges held that there was no unit of a mother and certain of her children known to law; and that any property conveyed to them would therefore be held by them as tenants-in-common and not jointly. It is rather a different matter where certain members of a tavazhi divide themselves off from the tavazhi. By dividing themselves off, some children cannot compel their mother to divide herself from those children who prefer to remain joint with her. This is so under Hindu law; and I do not see why it should not be so in a Marumakkattayam family. The question of fact whether the first plaintiff and the

* Second Appeal No. 160 of 1943. 9th February, 1944.

1. (1928) 55 M.L.J. 208 : I.L.R. 51 Mad. 574.
2. (1934) 68 M.L.J. 112.

defendant intended to remain joint or separate was never clearly before the Courts; and I would prefer not to express any opinion on that question here.

Assuming, however, that the first plaintiff and the defendant remained joint after the disruption of the tavazhi, I can see no reason why the first plaintiff should not now divide herself from her son. The first plaintiff and the defendant did not, in fact, constitute a tavazhi. If they did, it might be argued that the tavazhi could not be divided. As however the first plaintiff and the defendant allowed the tavazhi to become disrupted, I cannot see how one of them can compel the other to remain joint; and no reason has been suggested. Now that the first plaintiff has changed her mind, she is entitled to divide herself from the defendant and take her half share of the property and that can be done in this suit for partition.

It is argued that even though there be no reason why the first plaintiff should not take her half share of the property, yet the second plaintiff should not be given a decree; because the gift deed was invalid when it was executed. The proper procedure—it is said—would be to pass a partition decree in this suit only in favour of the first plaintiff. If the gift is made afresh, the second plaintiff could then bring another suit. I can see no reason for the adoption of such a cumbrous procedure. If the first plaintiff is now divided from the defendant and is desirous that her half share should be given to the second plaintiff, I can see no obstacle to the granting of a decree in favour of the second plaintiff.

The appeal is allowed, the decree of the lower appellate Court set aside, and the decree of the District Munsiff restored. All parties will bear their own costs in this Court and in the lower appellate Court.

B.V.V. ——— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

P. Chinaramiah .. *Petitioner.**

*Madras Commercial Crops Markets Act (XX of 1933), section 4 (1) Explanation—Scope—Place used for pressing and processing own crop of tobacco—Taking out of license is essential.*

Under the Explanation to section 4 (1) of the Madras Commercial Crops Markets Act it is only for a place used for the purchase and sale of a commercial crop that no license is necessary if the crop sold was one grown by the individual himself. If any place is used for the pressing and processing of tobacco the Explanation to section 4 (1) does not cover the case and a license will have to be obtained. Failure to take out such license will be an offence justifying a conviction.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session, Guntur division, dated 10th February, 1943 and passed in C. A. No. 16 of 1943 preferred against the judgment of the Additional First Class Magistrate, Ongole, dated 11th January, 1943 and passed in C. C. No. 161 of 1942.

*A. Narasimha Aiyar* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner has been convicted for an offence punishable under section 17 of the Madras Commercial Crops Markets Act (XX of 1933) and has been sentenced to pay a fine of Rs. 500. The case against him was that he did not take out a licence as required under section 4 (1) of that Act in respect of a place used by him for storing, pressing and processing of tobacco at Inkollu. It is clear from the evidence of P. Ws. 1 and 2 that the petitioner had such a place at Inkollu and that tobacco was being pressed there. What is stated by the petitioner is that under the explanation to section 4 (1), he need not take out a licence if the tobacco was his own and therefore, in the absence of any definite evidence to show that the tobacco was not his own, he ought not to have been convicted.

* Criminal Revision Case No. 508 of 1943. 24th September, 1943.
(Criminal Revision Petition No. 461 of 1943.

It is true that there is no positive and direct evidence to show that the tobacco that was found in that factory, when P. Ws. 1 and 2 inspected was not the tobacco grown on the land of the petitioner. But then, from a number of circumstances an inference was sought to be drawn against him. There is the fact that though the notice of demand was sent as early as July, 1941, he did not send a reply till January, 1942. It is also in evidence that he had made purchases of tobacco in previous years, and even in his own statement he stated that he has made some purchases in that year also. Further if the tobacco that was there was the tobacco of the petitioner, he could have very easily proved it. But he has not let in any evidence to that effect. From all these circumstances an adverse inference was drawn against him and he was convicted. I do not think I will be justified in questioning the propriety of that inference. Apart from this, under the explanation to section 4 (1), it is only for a place used for the purchase and sale of a commercial crop no licence was necessary if the crop sold was one grown by the individual himself. Under section 4 (1),if any place was used for the purchase, sale, storage, weighment, pressing or processing of the crop, a license will have to be obtained. The evidence of P. W. 1 was that in a factory at Inkollu what was done was the pressing and processing of tobacco. But the explanation does not cover processing and therefore it cannot be said that the conviction is incorrect.

With regard to the sentence, it is true that the maximum has been awarded. But then the punishment has necessarily to be fixed with reference to the status of the accused. The petitioner who was a rich man with a big trade of his own, ought to have known better and I therefore see no reason to interfere. The petition is dismissed.

K.S. — *Petition dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Ayya Ramaswamy Naicker (deceased) and others .. *Petitioners**

*v.*

Manickka Naicker and others .. *Respondents.*

*Appeal against dismissal of suit claiming special damages (being costs incurred in launching a prosecution for alleged libel)—Death of appellant—Cause of action does not survive to his legal representatives—Succession Act (XXXIX of 1925), section 306—Applicability.*

Under Section 306 of the Indian Succession Act the cause of action for defamation does not survive. Where the plaintiff's claim was one for special damages (being the expenses incurred in prosecuting the defendant) for an alleged libel contained in a petition said to be sent by the defendants to the District Board President, so far as the defendants were concerned the cause of action against them was the sending of their petition containing the alleged libel and the act of the plaintiff in launching a prosecution was a voluntary act. Consequently the cause of action in the case was the defamation. On the death of the unsuccessful plaintiff pending a second appeal the cause of action does not survive and his legal representatives cannot be brought on record in the second appeal.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to bring on record the petitioners herein as the legal representatives of the deceased appellant in S.A. No. 309 of 1943 on the file of the High Court, preferred against the decree of the District Court of Chingleput in A.S. No. 206 of 1941 in O.S. No, 394 of 1940, District Munsif Court, Tiruvallur.

*R. Rajagopala Aiyangar* for Petitioners.

*V. C. Viraraghavan* for Respondents.

The Court made the following

ORDER.—The petitioners seek to be brought on record as the legal representatives of the appellant in S. A. No. 309 of 1943. The original appellant who was the plaintiff filed the suit to recover the expenses incurred by him in prosecuting the defendants for an offence punishable under Sec. 500, Indian Penal Code.

* C. M. P. No. 3848 of 1943. 24th November, 1943.

The defendants were said to have sent a petition to the President, District Board of Chingleput imputing bad character and dishonesty to the plaintiff, and he claimed in the suit not general damages, but only the money said to have been expended in conection with the criminal case. The first Court dismissed the suit on the ground that though it was maintainable, it was barred by limitation. On appeal the learned District Judge of Chingleput found that the suit was not maintainable and that if it was maintainable it was barred by limitation. After the second appeal was filed the appellant died and the petitioners file this petition to be brought on record as his legal representatives. The respondents oppose the application on the ground that the cause of action did not survive and therefore that the appeal abated and that consequently the legal representatives could not be brought on record. Therefore the only question for consideration is whether the cause of action survived.

The cause of action for the suit is the alleged libel contained in the petition sent to the President of the District Board of Chinglput. It is true in the plaint it is definitely stated that the claim for general damages was reserved and that the suit was filed only for the actual expenses incurred in connection with the prosecution of the offence punishable under Sec. 500, Indian Penal Code. But that does not make the cause of action anything different, for it is the fact that they sent the petition that is put forth as the basis of the expenses incurred by the plaintiff.

Under Sec. 306 of the Indian Succession Act the cause of action for defamation does not survive. It is urged for the petitioners that the suit being one for special damages and not for general damages, the cause of action would survive to the heirs or the legal representatives inasmuch as the estate of the deceased had incurred the loss to the extent of the amount claimed by reason of the prosecution necessitated by the action of the defendants in having sent such a petition. The act of the plaintiff in launching the prosecution was a voluntary act, and so far as the defendants are concerned the cause of action against them was the sending of the petition and consequently the cause of action in this case was the defamation.

In *Palaniappa Chettiar* v. *Rajah of Ramnad*[1], the question had to be considered in connection with a suit for damages for malicious prosecution. The damages in that suit were claimed under two heads : one was general damages and the other was by way of special damages under two heads, namely, vakil's fees paid by him and the travelling and other incidental expenses for getting the witnesses for the purpose of defending the prosecution launched against him. It was contended that at least in respect of the special damages it would survive. The plaintiff died pending the litigation. It was pointed out that the cause of action in respect of both was the launching of the prosecution and that the legal representative can sue only for a tangible measurable pecuniary loss caused to the estate by reason of the tortious act, and that such expenses, namely, expenses incurred for paying the vakil and for travelling expenses cannot be said to be losses to the estate of the deceased and that it must be treated as merely incidents of the main cause of action and not as giving rise to a separate head of liability enuring after the death of the party to the legal representative. This is a decision of a Bench, and in the face of this decision, I do not think it could be said that when the claim is only for special damages the claim would survive to the legal representative. In a similar case in *Subramania Iyer* v. *Venkataramier*[2], it was pointed out that the cause of action was a single individual one and it was a personal transaction.

A number of English authorities were cited for the petitioners for their contention that in cases of special damages the right of action would survive because the injury was by the diminution of the personal estate of the deceased. But all of them have no application to the facts of this case. *Bradshaw* v. *Lancashire and Yorkshire Railway*[3], is a case of an action for breach of contract and the damage com-

1. (1925) 50 M.L.J. 34 : I.L.R. 49 Mad. 208.
2. (1914) 31 I.C. 4.
3. (1875) 10 Common Pleas 189.

plained of was a damage to the personal estate arising in the lifetime of the testator for medical expenses, the loss occasioned by his inability to attend to his business. The breach of the contract in this case was on the part of the defendant railway company to take due care in carrying the testator while he was a passenger in the train. The facts of this case relating to the breach of contract have no application to the facts of this case, which is one in tort. The decision in *Finlay* v. *Chirney*[1], also relates to an action for breach of promise to marry, and the question there was with regard to the special damages. *Hatchard* v. *Mege*[2], related to an action for defamation in which there were two claims, one for libel and the other was in the nature of slander of title. It was held that the claim for libel did not survive, while the claim in respect of slander of title survived and could be continued by his personal representative. That was a case of causing direct injury to the property and therefore survived. Consequently that decision has no application to the facts of this case, for in this case the act complained of, namely, the defamation did not directly cause injury to the estate of the plaintiff. *Twycross* v. *Grant*[3] also was a case of injury directly caused to the personal estate, and at page 47 this is what Cotton, L.J., observes :

> " It has been argued that this is an action to recover damages; in one sense that is true; but it is an action for wrong done not to the intestate himself, but to his property; therefore the right to sue after his death was transmitted to his personal representative."

Reliance was placed on the following observations in *Phillips* v. *Homfray*[4] for the contention that where the claim is for liquidated damages it would survive but not when it is for an unliquidated damage :

> "It is of the essence of the rule that claims which are indeterminate in their character shall not be pursued against the estate of a person after his death. If the claim is one for unliquidated damages and has not been perfected by judgment at the time of the death of the defendant the rule applies: *Smith* v. *Eyles*[5]."

These observations were made with regard to a plea set up by the legal representative that in respect of the enquiries in respect of which the claim was said to have abated " his liability must be taken to have been pronounced, and that what remained to be done in the action was of a ministerial character only, and would not be affected by the maxim *actio personalis moritur cum persona*." Therefore these observations have no application to the contention in this appeal.

I therefore find that the cause of action in the appeal did not survive and that consequently the appeal abated and the petitioners are not entitled to be brought on record as the legal representatives in the second appeal.

The petition is accordingly dismissed with costs. Leave refused.

K.S. ——— *Petition dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Sivani and others .. *Appellants**

*v.*

Madhavadi Nadar and others .. *Respondents.*

*Madras Estates Land Act (I of 1908), sections 112 and 132—Sale in execution of a decree for arrears of rent—Notices issued to some only of the legal representatives of the defaulter—Sale binding on all interested in the estate.*

In execution of a decree for arrears of rent obtained against a ryot, a Christian, the property was sold according to the procedure prescribed by the Madras Estates Land Act. Many years later, the daughters of the ryot (who had died in the meanwhile) brought a suit for partition, alleging that their shares were not legally sold as notices were issued only to the sons of the deceased ryot ignoring the daughters, and that the equitable principles invoked in the execution of Civil Court decrees would be inapplicable to proceedings under the Madras Estates Land Act.

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1. (1887) 20 Q.B. 494.
2. (1887) 18 Q.B. 771.
3. (1878) 4 Common Pleas Dvn. 40.
4. (1883) 24 Ch.D. 439 at 466.
5. 2 Atk. 385.

* S. A. No. 1323 of 1942. 3rd February, 1944.

*Held*, that the principle that, if parties are impleaded in execution in the belief that they represent the estate, the proceedings are ordinarily binding on all those interested in the estate, must be of universal application, or the gravest injustice might be done to the most diligent of decree-holders. Further, section 112 of the Madras Estates Land Act is primarily intended to apply to cases of sale without the intervention of the Court through the Collector. The sections of chapter VI of the Act applicable to sales in execution of decrees do not mention anything with regard to the adding of legal representatives; and as the procedure laid down in the Civil Procedure Code is to apply where it is not contrary to the provisions of the Madras Estates Land Act, the equitable principle mentioned above could be invoked in such proceedings.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura dated 10th July, 1942, in A. S. No. 113 of 1941, preferred against the decree of the Court of the District Munsiff of Paramakudi in O. S. No. 81 of 1940.

*S. V. Venugopalachari* and *S. Venkatesan* for Appellants.

*S. Panchapagesa Sastri* and *M. R. Narayanaswami* for Respondents.

The Court delivered the following

JUDGMENT.—The Rajah of Ramnad obtained a decree against one of his ryots for arrears of rent in 1921. Various payments were said to have been made from time to time; but finally in 1934, execution proceedings were taken out. The Collector fixed the terms of the proclamation and the date for sale, and appointed an Amin as the selling officer, instructing him to proclaim the sale in the village. The property was in due course brought to sale; and the first respondent, who was the successful auction purchaser, entered into possession. Many years later, in 1940, the daughters, who are the appellants here, brought the present suit for partition, alleging that their shares were not legally sold. The first Court held in the appellants' favour, finding that the first respondent had not proved that the estate acted in good faith in issuing notice only to the sons and ignoring the daughters. The lower appellate Court held that the estate had acted in good faith and that therefore the first respondent had obtained title to the whole of the land.

I agree with the lower appellate Court that there is no reason to doubt the good faith of the estate in issuing notice only to the sons. If the parties had been Hindus instead of Christians, they would have been the heirs to their father's property or, if it had been joint family property, they would have obtained it by survivorship. I have no doubt that the estate gave notice to the sons because they believed that the sons were entitled to represent their father's estate; and in doing so, they undoubtedly acted in perfect good faith.

It is conceded that if parties are impleaded in execution in the belief that they represent the estate, the proceedings are ordinarily binding on all those interested in the estate; but it is argued that this would not be so if the proceedings were under the Madras Estates Land Act. Section 112, it is said, is imperative; and notice must go to the defaulter. If the person in whose name the land is registered be dead, the defaulters would be his legal representatives and there would be no room for the application of those equitable principles invoked in the execution of Civil Court decrees. The principle in question must however be of universal application, or the gravest injustice might be done to the most diligent of decree-holders. However, even if such a contention be taken seriously, it is clear that section 112 of the Act is primarily intended to apply to cases where the landholder brings the land to sale without the intervention of the Court through the Collector. As sections 113 to 115 obviously could have no application to a sale in execution of a decree, it is reasonable to suppose that the sections in this chapter that can be applied to execution in accordance with the provisions of section 132 of the Act would begin not earlier than section 116. If so, then nothing is said in these sections (or indeed in section 112 for that matter) with regard to the adding of legal representatives; and as the procedure laid down in the Code of Civil Procedure is to apply where it is not contrary to the provisions of the Act, this equitable principle could be invoked.

It is next argued that good faith is not enough if the sons did not in fact properly represent the estate in which their sisters had a share. It is pointed out that they remained *ex parte* in the execution proceedings and did not challenge the proceeding in a suit, on the ground that illegalities had been committed in the execution sale. The illegalities said to have been committed are connected with the failure of the Collector to appoint an officer to conduct the sale until he himself had fixed a date for terms of proclamation. This would doubtless have afforded a ground for setting aside the sale if the sons had filed a suit for setting it aside within one year ; and it is argued that as the sons did not do this, they cannot be said to have properly represented their sisters' interests. Their sisters' interest was not, however, higher than their own ; and there was no reason why they should have filed a suit to set aside the sale. If they had done so and the sale had been set aside, it would have been re-held with much the same result. I am not prepared to say that the sons acted negligently in not having brought a suit to set aside the sale.

I agree with the lower appellate Court that the sale is binding on the daughters and that the suit was properly dismissed.

The appeal is dismissed with the costs of the first respondent.

V.S. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

S. N. A. S. A. Annamalai Chettiar .. *Applicant**

*v.*

The Commissioner of Income-tax, Madras .. *Respondent.*

*Indian Income-tax Act (XI of 1922) as amended by Act (VII of 1939)—Assessee carrying on money-lending business outside British India acquiring houses fetching rent—Income derived liable to be assessed on the basis of section 9 of the Act.*

By Act VII of 1939 a resident in British India became liable to pay the tax on income accruing to him without British India as well as on his income within British India and section 9 of the Income-tax Act, (XI of 1922), automatically became applicable to income from house property owned abroad.

Where the assessee was carrying on a money-lending business outside British India and acquired while engaged in such business houses from which he received rent,

*Held*, that in the circumstances, the tax in respect of the income derived, from the houses was to be levied on the basis of section 9 of the Act.

*Ramaswami Chettiar* v. *Commissioner of Income-tax*, (1933) 65 M.L.J. 849 : I.L.R. 57 Mad. 22, held inapplicable.

Case referred to the High Court by the Income-tax Appellate Tribunal, Calcutta, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in Application No. 66, R. A. No. 10, Madras of 1943-44 on its file for decision on the following question of law, namely,

"Whether in the circumstances of the case, the provisions of section 9 of the Income-tax Act were rightly applied for assessment of the income from house properties situated outside British India."

*P. R. Srinivasan* for Applicant.

*K. V. Sesha Aiyangar* for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—The assessee is a Nattukottai Chettiar and before the Japanese occupation of the Malay Peninsula he carried on a money-lending business at Penang. While engaged in business there he became the owner of a number

* Case Referred No. 42 of 1943. 17th March, 1944.

of houses from which he received rent. In the year 1941-42 he was assessed to tax under the Indian Income-tax Act in respect of the income derived from these houses during the previous year. The tax was levied on the basis of section 9 of the Act. The assessee contended that section 9 did not apply, but that section 10 did. This contention was rejected by the Income-tax authorities and by the Income-tax Appellate Tribunal, Calcutta Bench, on appeal from the order of the Additional Appellate Assistant Commissioner. At the request of the assessee the Tribunal has referred the following question for the opinion of this Court,

> " Whether in the circumstances of the case, the provisions of section 9 of the Income-tax Act were rightly applied for assessment of income from house properties situated outside British India."

Until the Act was amended in 1939 income accruing abroad to a resident of India was not taxable until it was brought into British India. By Act VII of 1939 a resident in British India became liable to pay the tax on income accruing to him without British India as well as on his income within British India. The assessee says that the Tribunal was wrong in holding that section 9 can be applied to income derived by him from his house property in Penang because the section was in the Act before its amendment in 1939 and then only applied to income from property situate in British India. He goes on to say that the income from his houses in Penang must be regarded as income accruing to him in the course of his business, which means the application of section 10. This latter argument is based on the decision of this Court in *Ramaswami Chettiar* v. *Commissioner of Income-tax, Madras*[1]. In that case, the assessee carried on a money-lending business in Kuala Lampur and received rents from properties which he had taken over in satisfaction of loans granted by him in the course of his business. The income from these properties was brought into British India, and the question was whether section 9 was applicable. It was held that it was not and that the tax should be levied in accordance with section 10 as income derived from business carried on abroad, the properties having been acquired in the course of the business. We consider that the decision in *Ramaswami Chettiar* v. *Commissioner of Income-tax, Madras*[1], can no longer be applied. Foreign income is now taxable whether brought into India or not. Section 6 sets out the heads of income chargeable and the third head is income from property. When the Act was amended in 1939 by including income accruing abroad section 9 automatically became applicable to income from house property owned abroad. Moreover the proviso to section 9 (1) (*iv*) itself gives clear indication that the Legislature did intend to make the section applicable to income derived from property outside British India. Clause (*iv*) allows certain deductions to be made in calculating the taxable amount of this class of income, but the proviso says that no allowance shall be made in respect of any interest or annual charge payable without British India and chargeable under the Act, not being interest on a loan issued for public subscription before the 1st April, 1938, except interest or a charge on which tax has been paid or from which tax has been deducted, under section 18 or in respect of which there is an agent for the payee in British India who may be assessed under section 43.

In this Court it has been suggested that if section 10 does not apply section 12 does apply. Section 12 refers to income from " other sources," that is, income from sources not specifically dealt with in the earlier sections of the Act. If section 10 cannot be applied, as we hold it cannot, section 12 is even more inappropriate.

We consider that the decision of the Tribunal upholding the assessment in accordance with section 9 of the Act was right and we answer the question referred accordingly.

The assessee will pay the costs of the Commissioner of Income-tax, Rs. 250.

V.P.S. ——— *Reference answered.*

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1. (1933) 65 M.L.J. 849 : I.L.R. 57 Mad. 22 (F.B.).

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Jaganmandalathipathi Gopanna Mannadiar, Zamindar of Zamin Poravipalayam .. *Appellant**

*v.*

K. Ramaswami Gounder and others .. *Respondents.*

*Civil Procedure Code (V of 1908), section 9—Right to celebrate the annual worship of a deity in a temple—Is a civil right in respect of which a suit for injunction is maintainable in a Civil Court.*

Certain villagers claiming that the worship of a deity should have been celebrated by themselves sued for a permanent injunction restraining the defendants (the zamindar and a villager of an adjoining village) from celebrating the annual worship of the deity (Makali Amman) of the village during that year or at any future time. The defendants' case was that it was the zamindar who had the right to perform the ceremonies in the temple and that the plaintiffs had not the right which they claimed. On a question as to the cognizability of the dispute by the Civil Court,

*Held*, that though it may not always be easy to draw the line between what is merely a part of the ritual of the worship and what is a right to conduct the worship itself, in the present case there is a straightforward claim to have the right to perform the annual worship of the Goddess which is enforceable by a civil suit.

*Kadirvelu Chetti* v. *Nanjunda Aiyar*, (1916) 3 L.W. 512 and *Thirumalai Alwar Ayyangar* v. *Lakshmi Sadagopa Ayyangar*, (1916) 31 M.L.J. 758, relied on.

Appeal against the order of the District Court of Coimbatore dated 9th April, 1943 and made in A. S. No. 430 of 1942, preferred against the decree of the Court of the District Munsiff of Coimbatore in O. S. No. 353 of 1941 dated 28th August, 1942.

*S. S. Ramachandra Aiyar* for Appellant.

*T. V. Ramanatha Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The question in this civil miscellaneous appeal is whether a right to celebrate the annual worship of a deity in a temple is a civil right so as to enable a suit to be maintained in a Civil Court for an injunction in respect of that right. The plaintiffs in the suit out of which this appeal arises represent the villagers of Sircar Poravipalayam. They sued, as the plaint prayer shows "for a permanent injunction restraining the defendants from celebrating the annual worship of Makali Amman of Sircar Poravipalayam during this year or at any future time," and the cause of action for the suit was said to have been that the worship which should have been celebrated either between the 15th February and 15th March, that is, in the Tamil month of Masi, by the plaintiffs or not at all, had been celebrated on the 8th or 9th April by the defendants. The defendants are the zamindar of the adjoining village of Zamin Poravipalayam and a villager of that village. Their case was that it was the zamindar who had the right to perform the ceremonies in the temple and that the plaintiffs had not the right which they claimed. The suit was dismissed by the Principal District Munsiff of Coimbatore on the ground that the Civil Court had no jurisdiction to adjudicate upon the claim. On appeal by the plaintiffs the Additional District Judge of Coimbatore, holding that the Civil Court had jurisdiction, remanded the case to the District Munsiff for disposal on merits. Against the order of remand the defendants are now appealing.

It is conceded by learned counsel for the appellant that the dispute is really one concerning the particular month in which the worship of the deity should be celebrated, and that the choice of the month must be regarded as merely a part of the ritual of the worship of the deity with which a Civil Court will not interfere. This contention, I think, has no real substance. No doubt it is set out in the plaint that the worship should be conducted only in the month of Masi and that, if it is not for any reason conducted in that month, it should not be conducted at all. These recitals however are only incidental to what is the essence of the plaintiffs' claim,

* A. A. O. No. 323 of 1943. 4th February, 1944.

namely, that they and not the defendants have the right to perform the ceremony. The view taken by the District Munsiff was that the plaintiffs would only have a right to sue if they were in the position of holders of an office who, by virtue of their office, were under a duty to celebrate the worship of the deity, and in support of this view he cited a number of cases. The argument in support of this appeal has proceeded on the same lines. I have been referred to *Thathachariar* v. *Srinivasaraghava Aiyangar*[1], *Periyanan Servai* v. *Mahadevan Ambalam*[2], *Ramalinga Mudali* v. *Sundara Sastrigal*[3], *Narayanan Mudali* v. *Peria Kalathi Mudaliar*[4], *Appadurai Iyengar* v. *P. B. Annangaracharia*[5], *Subaraya Mudaliar* v. *Vedantachariar*[6], *Srinivasa Thathachariar* v. *Srinivasa Ayyangar* and *Srinivasachariar* v. *Srinivasa Thathachariar*[7]. The last case, I think, is distinguishable because it really related to the right of members of a certain community to take part in a ceremony which there was no doubt that other persons had a right to conduct. *Ramalinga Mudali* v. *Sundara Sastrigal*[3] is also not in point, as it relates to the powers of the Court under a scheme. The other cases have this in common that they relate to the jurisdiction of the Civil Court to entertain suits to declare rights to take part in ceremonies, or to take a particular part in a ceremony, or to assume a position of particular performance in a ceremony. It was held in all the cases that unless the right claimed was attached to an office a suit was not maintainable. The basis for the decisions was that a Civil Court will not interfere with matters of ritual and that questions which do not relate to a right to worship *per se* but to the manner in which the worship should be conducted, or the particular part that an individual is entitled to perform in the worship, are matters of ritual which give rise to no civil rights that are enforceable in Civil Courts. It does not seem to me however that any of these cases was concerned with the question of the right to perform a particular ceremony itself, as apart from the manner in which the ceremony should be performed or the part that an individual may take in the ceremony. This question has been considered in two cases that have been cited by learned counsel for the respondents. In *Kadirvelu Chetti* v. *Nanjunda Iyer*[8], Seshagiri Ayyar, J., held that a suit for a declaration of the right of the plaintiffs to perform the *kalyana utsavam* in a certain temple was maintainable; and in *Thirumalai Alwar Ayyangar* v. *Lakshmi Sadagopa Ayyangar*[9], it was held that a suit for a declaration to perform "*thirupallandu mandagapadi*" on the 1st day of *Pagalpathu* festival in a certain temple in Alwar Thirunagari could be maintained. No doubt, it may not always be easy to draw the line between what is merely a part of the ritual of worship and what is a right to conduct the worship itself. But it seems to me that in the present case there is a straight forward claim to have the right to perform the annual worship of the God which is enforceable by a civil suit.

In my opinion, therefore, the decision of the first appellate Court was correct, and the appeal must be dismissed with costs.

Leave to appeal is refused.

K.S. —— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Saladi Pichayya and another .. *Appellants**

*v.*

Alluri Venkata Suryanarayana Raju and others .. *Respondents.*

*Madras Agriculturists' Relief Act (IV of 1938)—Compromise decree—Antecedent promissory note debt—Portion of decree regarding costs—Scaling down of debt.*

1. (1938) 1 M.L.J. 174.
2. (1935) 41 L.W. 752.
3. (1928) 120 I.C. 874.
4. (1939) 1 M.L.J. 199.
5. (1939) 1 M.L.J. 124.
6. (1904) 14 M.L.J. 171 : I.L.R. 28 Mad. 23.
7. (1899) 9 M.L.J. 355.
8. (1916) 3 L.W. 512.
9. (1916) 31 M.L.J. 758.

* A. A. O. Nos. 73 and 74 of 1944. 20th January, 1944.
(Appeals Nos. 189 and 255 of 1942 converted into A.A.O.)

A compromise decree provided for the payment of the full amount of the suit claim with interest and costs, the agreement only relating to the instalments in which it was to be paid and the security to be given. The decree was based on a promissory note of 1930 which included a certain sum paid as cash and a certain amount due on an earlier promissory note of the year 1928. It appeared that the latter note was the result of a partition in the debtor's family whereby the first defendant became liable for half the debts of the family.

*Held*, that the integrity of the anterior debts was broken by the partition and that the debts incurred by the first defendant after partition constituted a fresh obligation. The debt had consequently to be scaled down to the principal of the note of the year 1928 together with the subsequent cash advance under the note of 1930 and costs.

*Ramasubbier* v. *Rama Aiyar*, (1941) 1 M.L.J. 39, relied on.

*Held, further*, that in scaling down the compromise decree it was necessary to differentiate between the decree representing costs and the amount of the decree representing the debt with interest thereon. It cannot be contended in such a case that the liability for costs had been extinguished.

*Narayanan Chettiar* v. *Veera Goundar*, (1941) 2 M.L.J. 658, referred to.

Appeals against the order of the Court of the Subordinate Judge of Narsapur in C. M. P. No. 640 of 1938 in O. S. No. 44 of 1933.

*P. Satyanarayana Rao* and *S. Venugopala Rao* for Appellants in A. A. O. No. 73 of 1944 and for Respondents in A. A. O. No. 74 of 1944.

*P. Somasundaram* and *P. Satyanarayana Raju* for Respondents in A. A. O. No. 73 of 1944 and for Appellants in A. A. O. No. 74 of 1944.

The Judgment of the Court was delivered by

*Wadsworth, J.*—These two appeals are preferred, the former by the creditors and the latter by the debtors, against an order on an application under section 19 of the Madras Act IV of 1938. In the light of the amended Act, the appeals have to be treated as C. M. As. and petitions have been filed for their conversion and the refund of excess court-fee which must be allowed.

The only point in the creditors' appeal (A.A.O. No. 73 of 1944/App. No. 189 of 1942) which deserves serious consideration relates to the extent to which the scaling down process can be carried. The decree was a compromise decree which provided for the payment of the full amount of the suit claim with interest and costs, the agreement only relating to the instalments in which it was to be paid and the security to be given. The decree was based on a promissory note of 1930 which included a sum of Rs. 1,346 and odd cash and an amount of Rs. 7,653-2-9 due on an earlier promissory note, Ex. P-9-a executed in 1928 for Rs. 6,344-5-3. This promissory note itself was the result of a partition in the debtors' family whereby the first defendant became liable for half the debts of the family and he executed the note Ex. P-9-a in respect of his half share of three separate family debts. It seems clear that the integrity of these anterior debts was broken by this process of partition and that the debts incurred by the first defendant after partition in respect of the total of the three half debts allotted to him must be treated as a fresh obligation. This matter is covered by one of the cases quoted by the learned Subordinate Judge, namely, *Ramasubbier* v. *Rama Ayyar*[1]; but the learned Judge has overlooked the rule relating to this matter in that case. It follows then that the debt has to be scaled down to the principal of the note Ex. P-9-a together with the subsequent cash advanced under Ex. P-9 and costs.

The debtors' appeal raises a question regarding liability for costs. The argument is based on a misunderstanding of our decision in *Narayanan Chettiar* v. *Veera Goundar*[2]. We are not concerned here, as we were in that case, with the appropriation of payments in the first instance towards costs. The debtors have sought to scale down this compromise decree on the theory that it was in substance a renewal of a previous liability under the promissory note. For this purpose it is necessary for them to differentiate between the amount of the compromise decree representing costs and the amount of the compromise decree representing the debt with interest thereon. It is absurd for them to contend that the liability for costs has been

1. (1941) 1 M.L.J. 39. 2. (1941) 2 M.L.J. 658.

extinguished. It is only because the amount of costs can be ascertained that they are able to go back to the antecedent debt.

The result therefore is that (A.A.O. No. 73 of 1944/App. No. 189 of 1942) is allowed with costs and for the figure of Rs. 5,105-8-3 appearing in the lower Court's decree will be substituted the figure of Rs. 7,691-2-6. A. A. O. No. 74 of 1944/ App. No. 255 of 1942) is dismissed with costs.

B.V.V. ——— *A.A.O. No.* 73 *of* 1944 *allowed and A.A.O. No.* 74 *of* 1944 *dismissed.*

## [FULL BENCH.]

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

G. Srinivasa Ayyar and others .. *Appellants**

*v.*

T. S. Swaminatha Odayar and another .. *Respondents.*

*Madras Agriculturists' Relief Act (IV of 1938), section 3 (ii), proviso C—Scope and effect—Assessment to property tax—If should be in the name of debtor in the municipal assessment register so as to exclude him from the definition of an 'agriculturist.'*

A case comes within proviso C to section 3 (*ii*) of Madras Act IV of 1938 when the following factors are present :

(*i*) There is property which has an annual rental value of not less than Rs. 600 ;

(*ii*) the property has been assessed to house or property tax for two years immediately preceding the 1st October, 1937 ; and

(*iii*) the municipality demands or recovers the tax from the owner or otherwise treats him as liable to pay the tax.

The decision in *Swaminatha Odayar* v. *Srinivasa Aiyar*, (1939) 2 M.L.J. 495, is erroneous in that it holds that a person cannot be assessed within the meaning of the proviso unless the assessment is made in his name in the municipal assessment register.

The insertion in the assessment register of the name of the true owner of the property is not the deciding factor.

Appeal against the order of the Court of the Subordinate Judge of Tanjore dated 9th February, 1942 and made in E. A. No. 342 of 1939 amending the decree in O. S. No. 30 of 1924.

*M. S. Venkatarama Aiyar* for Appellants.

*T. V. Muthukrishna Aiyar* and *R. Gopalaswami Aiyangar* for Respondents.

This appeal coming on for hearing, on the 16th December, 1943, the Court (*Wadsworth and Patanjali Sastri, JJ.*) made the following

ORDER OF REFERENCE : *Wadsworth, J.*—This appeal raises a question regarding the effect of proviso C to section 3 (*ii*) of Madras Act IV of 1938. The parties to this appeal and the facts affecting the decision of the question under proviso C are precisely the same as those dealt with by a Bench composed of Burn and Stodart, JJ., in *Swaminatha Odayar* v. *Srinivasa Aiyar*[1], though that decision arising out of an application under section 20 of the Act will not operate as *res judicata*. Briefly the facts are these :

The respondent was assessed to property tax in respect of properties at Mannargudi, the rental value of which is Rs. 495 per year. He was also the owner of properties in Tiruvarur, the rental value of which was Rs. 210. The municipal assessment register regarding the Tiruvarur properties retained during the relevant period the name of a former owner who had been dead for many years, Balasubramania Odayar. The respondent was a minor adopted by his grand-uncle and his guardian was his natural mother Meenakshi. In respect of the property tax on the Tiruvarur properties for the first half year of 1935-36 a notice, Ex. R-11, was sent with a covering letter to Meenakshi, without any description of her as the guardian of the minor owner, and the owner of the property at the head of the notice was stated to be Balasubramania Odayar. Ex. R-12 is a receipt for the tax in the second half year of 1935-36 paid by the tenant Mr. Sambasiva Ayyar on the 7th September, 1935, who states that he paid it on behalf of Meenakshi Ammal and her name is written at the head of the receipt.

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* Appeal No. 162 of 1942. 14th March, 1944.

1. (1939) 2 M.L.J. 495.

This receipt is, however, before the relevant period under proviso C. During the relevant period we have the following documents. Ex. R-13 relates to the second half-year of 1935-36. The notice of demand goes in the name of the deceased owner Balasubramania Odayar. It bears a receipt showing that the tax was paid by Mr. Sambasiva Ayyar who produced the document. It does not appear that the notice was otherwise served on anybody. Ex. R-14 is a notice for the first half-year of 1936-37. It purports to have been issued to the occupier as such. The English portion of the notice recites, " that the tax remains unpaid by the owner, although the time allowed after the service of the notice on him has expired," but in the Tamil translation, which forms part of the notice this passage is scored out. Ex. R-15 shows that the tax was paid by Mr. Sambasiva Ayyar on the 28th January, 1937. Ex. R-17 is the notice regarding the second half-year of 1936-37. The notice runs in the name of the deceased Balasubramania Odayar. At the foot it is noted that " occupier notice was served " and there is a receipt in the name of Balasubramania Odayar. Ex. R-19 is a notice for the tax for the first half-year of 1937-38 served on the occupier, Mr. Sambasiva Ayyar on the 19th February, 1938. It thus appears that the name of the owner Swaminatha Odayar who was a minor is not found in any of the records, though his guardian was served before the relevant period with a notice demanding the tax. During the relevant period the tax was paid by the tenant and he has given evidence that he was paying it under the instructions of the guardian of the owner.

The Bench which decided the case already referred to held that this was a case in which the owner had escaped assessment, not a case in which he had been assessed to property tax. Since that decision was pronounced there have been numerous other decisions which have thrown light on the effect of proviso C to section 3 (*ii*) in cases in which tax was demanded and paid from persons standing in a representative capacity and there has been a good deal of light thrown on the question whether the term " assessment " denotes merely the writing of the name in the assessment register or whether it denotes primarily the demand and payment of tax. For convenience of reference the following cases may be quoted : *Sarveswara* v. *Umamaheswara*[1], *Swarnam Iswariah* v. *Kannappa*[2], *Tirugnanavalli Ammal* v. *Venugopala Pillai*[3], *Venkatappayya* v. *Mallayya*[4], *Namberumal Chetti* v. *Ramayya Naidu*[5], *Muthiah Chettiar* v. *Rayalu Aiyar, Nagaswami Aiyar and Co.*[6], A.S. No. 328 of 1941, A. S. No. 35 of 1941 and S. A. No. 1595 of 1942. It seems to us that the decision in *Swaminatha Odayar* v. *Srinivasa Aiyar*[7] may require reconsideration in the light of subsequent decisions. As the amount at stake in the present case is very large and the matter is one of considerable general importance we refer the following question to a Full Bench :

" Whether the decision in *Swaminatha Odayar* v. *Srinivasa Aiyar*[7] is correct in that it holds that a person cannot be assessed unless the assessment is made in his name in the municipal assessment register."

The papers will be placed before the Honourable the Chief Justice.

(This appeal coming on for hearing, in pursuance of the aforesaid Order of Reference, the Court expressed the following)

OPINION.—Proviso C to section 3 (*ii*) of the Madras Agriculturists' Relief Act, 1938, states that a person shall not be deemed to be an agriculturist if he has, within the two years immediately preceding the 1st October, 1937, been assessed to property or house-tax in respect of buildings, or lands, other than agricultural lands, under the Madras District Municipalities Act, 1920, or under any of the other Acts specified, if the aggregate annual rental value of the lands and buildings, whether let out or in the occupation of the owner, is not less than Rs. 600. In *Swaminatha Odayar* v. *Srinivasa Aiyar*[7], a Bench of this Court (Burn and Stodart, JJ.) held that a person cannot be deemed to be lawfully assessed within the meaning of this proviso unless his name has been inserted in the assessment register as the owner of the property. The correctness of this decision has been doubted and the doubt has led to this reference.

The parties in *Swaminatha Odayar* v. *Srinivasa Aiyar*[7] were the same as the parties in the present case and the facts were the same. The respondent owns immovable properties at Mannargudi and Tiruvarur which are assessed, and for many years have been assessed, to property tax. The respondent is a minor represented by his mother Meenakshi. The former owner of the Tiruvarur properties was one Balasubramania Odayar, who died over forty years ago. As the result of obvious negligence in the office of the Municipality his name remained in the assessment register as the owner of the Tiruvarur properties. The evidence in the case, however, leaves no room for doubt that the municipal officials knew who was the actual owner of the properties at all times material. In respect of the tax payable for the

1. I.L.R. (1941) Mad. 383.
2. (1941) 1 M.L.J. 605 : I.L.R. (1941) Mad. 840.
3. (1941) 2 M.L.J. 497.
4. (1942) 1 M.L.J. 388.
5. (1942) 1 M.L.J. 561.
6. (1943) 2 M.L.J. 548.
7. (1939) 2 M.L.J. 495.

first half of the year 1935-36 a notice was sent to Meenakshi and since then the tax has been paid by the tenant of the properties under her instructions.

The learned Judges who decided *Swaminatha Odayar* v. *Srinivasa Aiyar*[1] were not content with holding that the essential factor was the entry in the municipal register of the name of the owner of the property. They went so far as to describe as perverse the opinion of the Subordinate Judge that the words "assessed to" meant only "taxed in respect of" and not that the person's name should actually be found in the assessment register. In our judgment there was no justification for the statement that the Subordinate Judge's opinion was perverse. In fact we consider that the Subordinate Judge was right and the learned Judges were wrong in holding that there could be no assessment under proviso C unless the name of the owner of the property were actually inserted in the assessment register.

Under the District Municipalities Act, the assessment is imposed not on the individual, but on the property, as was pointed out in *Swarnam Iswariah* v. *Kannappa*[2]. The provisions of sections 82, 83 and 84 and the taxation rules set out in schedule IV of the Act leave no room for doubt that this is so. In *Swarnam Iswariah* v. *Kannappa*[2], it was also pointed out that the word "assess" is one which is susceptible of several different meanings and that according to the dictionary it may mean "to fix the amount of the tax" or "to determine the amount and impose the tax upon an individual" or merely "to impose a tax upon an individual" or "to estimate officially the value for purposes of taxation." In *Commissioner of Income-tax, Bombay* v. *Kharamchand Ramdoss*[3], the Privy Council had occasion to draw attention to the fact that the word "assessment" was used in different senses in various parts of the Indian Income-tax Act. Therefore no precise definition can be given to the word "assessed" in proviso C in sub-section (*ii*) of section 3 of the Madras Agriculturists' Relief Act and to discover what is meant by the proviso the Court must have regard to the wording as a whole and to the scheme of the Act. When this is done we consider that it is manifest that the proviso was inserted to prevent a person claiming relief under the Act as an agriculturist when he owns property of an annual rental value of not less than Rs. 600 and that property has within two years preceding the 1st October, 1937, been assessed to property or house-tax.

If the argument accepted by Burn and Stodart, JJ., were to be carried to its logical conclusion it would mean that an error on the part of a clerk in entering in the assessment register the name of the owner of a property liable to the tax would render the proviso entirely nugatory. This is a position which we are certainly not prepared to accept. Moreover, rule 10 of the rules framed under the Act states that where a person in whose name an assessment to property or house tax has been made in terms of the proviso proves that he was not the owner of the property or house assessed at any time during the period mentioned in the proviso, the assessment shall not by itself have the effect of excluding him from the category of "agriculturist" as defined in the section. This rule in itself is enough to indicate that the insertion in the assessment register of the name of the true owner of the property is not the deciding factor.

We hold that a case comes within the proviso when these factors are present: (1) There is property which has an annual rental value of not less than Rs. 600; (2) the property has been assessed to house or property tax for two years immediately preceding the 1st October, 1937; and (3) the Municipality demands or recovers the tax from the owner or otherwise treats him as liable to pay the tax. Accordingly we answer the question referred by saying that the decision in *Swaminatha Odayar* v. *Srinivasa Aiyar*[1] is erroneous in that it holds that a person cannot be assessed within the meaning of the proviso unless the assessment is made in his name in the municipal assessment register.

The costs of this reference will be made costs in the appeal.

K.S. —— *Reference answered.*

1. (1939) 2 M.L.J. 495.
2. (1941) 1 M.L.J. 605 : I.L.R. (1941) Mad. 840.
3. (1938) 2 M.L.J. 115 : L.R. 65 I.A. 236 : I.L.R. (1938) Bom. 487 (P.C.).

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE WADSWORTH.

Ps. Ar. Ar. Arunachalam Chettiar, by agent, Sivaraman Chettiar .. *Appellant**

*v.*

Palaniswami Goundan .. *Respondent.*

*Madras Agriculturists' Relief Act (IV of 1938), sections 20 and 21—Computation of the period of sixty days—Starting point—Date of order of interim stay or when it is made absolute—Whether, when the judgment-debtor becomes insolvent, the Official Receiver should be made a party.*

On the 12th July, 1939, the decree-holder in a mortgage suit filed an application for the execution of his decree and the 17th July, 1940, was fixed for the sale of the mortgaged property. On the 15th July, the judgment-debtor applied under section 20 of the Madras Agriculturists' Relief Act for a stay and on the 17th July an order for interim stay was passed. The stay was made absolute on the 25th July and the application for scaling down was filed on the 23rd September, 1940, as a result of which the decretal amount was reduced. On the questions whether the order reducing the decretal amount could not stand because the application had not been filed within sixty days of the order of the interim stay and whether the application is not maintainable because the Official Receiver had not been made a party to the proceedings as the applicant had been adjudicated insolvent prior to the mortgage suit :

*Held*, that (i) limitation for a proceeding under section 19 cannot run from the date of the interim order. The order contemplated in the proviso to section 20 is the order of stay pending the disposal of an application under section 19 passed on the application under section 20 ; (*ii*) it is a desirable procedure that both the insolvent and the Official Receiver should be parties to such an application but the proceedings would not be void by reason of the Official Receiver not having been made a party to the proceedings.

*Jagannadha Aiyangar* v. *Seeniveera Chettiar*, (1941) 1 M.L.J. 197 and *Krishna Rao* v. *Official Receiver, East Godavari*, (1941) 2 M.L.J. 698, explained.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Patanjali Sastri, J., dated 10th September, 1943, and passed in S. A. No. 1532 of 1942, preferred against the decree of the District Court of Coimbatore in A. S. No. 336 of 1941, preferred against the order of the Court of the Subordinate Judge of Coimbatore in I. A. No. 863 of 1940 in O. S. No. 17 of 1935.

*A. C. Sampath Aiyangar* for Appellant.

*S. Panchapagesa Sastri* and *C. Vasudevan* for Respondent.

The Court delivered the following

JUDGMENTS : *The Chief Justice.*—On the 20th July, 1935, the appellant obtained a mortgage decree against the respondent for the sum of Rs. 2,998-5-4. The mortgage was dated the 22nd December, 1931 and had been given as security for the repayment of amounts due on three promissory notes. On the 12th July, 1939, the decree-holder filed an application for the execution of his decree and in due course the Court fixed the 17th July, 1940, as the date for the sale of the mortgaged property. On the 15th July the judgment-debtor applied under section 20 of the Agriculturists' Relief Act, 1938, for a stay of the execution proceedings, pending an application for scaling down under section 19 of the Act. On the 17th July the Subordinate Judge passed an order of *ad interim* stay. That was a stay pending the filing of the counter-affidavit by the judgment-debtor and the hearing of the application. The application was heard on the 25th July when an order for stay was passed under section 20. The application for scaling down was filed on the 23rd September, 1940, and resulted in the decretal amount being reduced to Rs. 2,088-9-6. The decree-holder appealed against this order to the District Judge, who affirmed the order of the Subordinate Judge. The decree-holder then appealed to this Court. He contended that the order could not stand because the application had not been filed within sixty days of the order of *ad interim* stay and that the application was not maintainable because the Official Receiver had not been made a party to the proceedings under section 19. It appears that the respondent had

* L. P. A. No. 66 of 1943. 3rd March, 1944.

been adjudicated an insolvent before the institution of the mortgage suit. The decree-holder also attacked the order on the merits. The appeal was heard by Patanjali Sastri, J., who found against the decree-holder on all the points raised by him. This appeal is from the judgment of the learned Judge under clause 15 of the Letters Patent.

Section 20 of the Act states that the Court executing a decree shall, on application, stay the proceedings until the Court which passed the decree has passed orders on an application made or to be made under section 19. Then follows a proviso which states that where within sixty days after the application for stay has been granted the judgment-debtor does not apply to the Court which passed the decree for relief under section 19 or where an application has been so made and is rejected, the decree shall be executed as it stands, notwithstanding anything contained in the Act to the contrary. The appellant says that inasmuch as the application under section 19 was made more than sixty days after the order of *ad interim* stay, he is entitled to have the decree passed by the Subordinate Judge executed without any reduction. Patanjali Sastri, J., held that the order for stay contemplated by the section was the order for stay passed on the 25th July, 1940, and not the *ad interim* order, and I respectfully agree. There is nothing in the section which contemplates an *ad interim* order. I do not doubt that the Court has the power to pass an order staying the execution proceedings pending the hearing of the application under section 20, but that application was not heard until after the respondent had filed his appearance and admitted that he was an agriculturist. If the *ad interim* order were to be the starting point for the sixty days period of limitation, it would mean that if the creditor were not served within the period the judgment-debtor would be precluded from having his decree scaled down, which could never have been intended. In my judgment, it is quite clear that the *ad interim* order was not an order falling within the section and that the order which did fall within the section was the order of the 25th July.

The contention of the appellant that the Official Receiver was a necessary party to the application under section 19 appears to be made on the observations of my learned brother Wadsworth, J., in *Jagannadha Ayyangar* v. *Seeniveera Chettiar*[1] and *Krishna Rao* v. *Official Receiver, East Godavari*[2]. In the former case my learned brother said that it seemed to him proper that on such an application the Official Receiver in whom the estate vests should be impleaded as a party, and in the second case said that it seemed to him desirable that both the Official Receiver and the insolvent should be made parties to an application under the section. Patanjali Sastri, J., did not read these observations as meaning that an application under section 19 would not lie in the absence of the Official Receiver but that it was desirable that he should be made a party. I read the observations in the same way. Section 19 specifically refers to the application of the judgment-debtor who is an agriculturist. Section 21 provides that the Act shall not be applied to the debts of an insolvent where the dividend has been declared in the insolvency proceedings, but it goes on to state that if a dividend has not been declared the Act shall apply to debts payable by the insolvent if he would have been an agriculturist within the meaning of the Act but for his adjudication. It is quite a different matter to say that the Official Receiver should be a party to an application under section 19 from saying that the proceedings are altogether bad if he is not made a party. It is obviously desirable that he should be joined and this is the usual procedure. I am certainly not prepared to go so far as to say that proceedings would be void if the Official Receiver has not been made a party. In any event the objection should be taken when the application is made. There was no objection taken in this case to the non-joinder of the Official Receiver until the case came before Patanjali Sastri, J., on second appeal. The learned Judge dealt with the question; but having done so rightly went on to disallow it.

1. (1941) 1 M.L.J. 197.
2. (1941) 2 M.L.J. 698.
3. (1942) 2 M.L.J. 735.

On the merits there is even less to be said for the appellant's case. The contract between him and his mortgagor provided for the payment of interest at the rate of 36 per cent. per annum. He made his claim, however, on the basis of interest at 24 per cent. per annum. The mortgagor contended that this was far too high and asked the Court to apply the Usurious Loans Act. The Subordinate Judge held that 12 per cent. was ample and passed a decree on that basis. The appellant preferred no appeal. He now asks that the decretal amount should be calculated on the basis of interest at 24 per cent. and the appropriations settled by the District Judge should be made on this basis. This is a request which has only to be made to be refused. The decree stands and cannot be reopened. The respondent is entitled to have it scaled down in accordance with the provisions of the Act, and this has been done.

The appeal must be dismissed with costs.

*Wadsworth, J.*—I agree entirely with the judgment which my Lord has just pronounced and wish only to add a few words with reference to observations of mine which have been quoted in support of the appellant's arguments. On the question of limitation the appellant has quoted an *obiter dictum* in *Nataraja Gramani* v. *Sivakolunda Gramani*[1]. The facts are not given in the report. The point raised was one of limitation with reference to an *ad interim* order of stay in an application under section 20. I observed that the procedure of granting an *ad interim* stay followed by an absolute order is not contemplated by section 20 of Act IV of 1938. and that when once a stay has been granted limitation for an application under section 19 will begin to run. I should like to make it clear that in my opinion section 20 does not contemplate the grant of *ad interim* order of stay, but that if the Court finds it necessary to stay execution pending the hearing of the application under section 20, the Court has ample power to do so under the ordinary law. Such an *ad interim* stay order is not an order under section 20 at all and limitation for a proceeding under section 19 cannot run from that order. The order contemplated in the proviso to section 20 is the order of stay pending the disposal of an application under section 19, passed on the application under section 20.

On the question of the procedure to be adopted under section 21 of the Act, two decisions of mine have been quoted, which lay it down as a desirable procedure that both the insolvent and the Official Receiver should be parties to such an application. That is the procedure which has, I think, been generally adopted. The Act itself lays down no procedure. When the debt to be scaled down is due from an insolvent on whose estate no dividend has been declared and is due under a decree, it is obvious that section 21 has to be read with section 19 and that the application has to be made by the person who is the judgment-debtor on the record. In the present case both the present respondent and the Official Receiver were judgment-debtors on the record. There was nothing to prevent the application from being made by either of them and in my opinion it was desirable that whichever made the application the other party should be joined. But clearly the question whether the Official Receiver is a party on the record is largely a question of form, for in all probability when the application is made by the debtor the Official Receiver will be financing the application and ready to come on record if desired. As no objection was taken for the non-joinder of the Official Receiver in the trial Court, it is obvious that the objection cannot be raised in appeal.

I agree with the order that the appeal must be dismissed with costs.

V.P.S. ——— *Appeal dismissed.*

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1. (1942) 2 M.L.J. 735.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE WADSWORTH.

Amperayani Subba Rao .. *Appellant**

*v.*

Cherlo Seshu Reddi and others .. *Respondents.*

*Provincial Insolvency Act (1920), sections 38 and 39—Scheme of composition approved of by Court without notice to 'all' creditors—Not binding on creditor without notice.*

The direction in section 38 of the Provincial Insolvency Act that notice shall be served on 'all' creditors is mandatory and the section clearly contemplates that all the creditors shall have an opportunity of stating their objections to the scheme.

Where though the scheme is approved of by the necessary majority of creditors, the provisions of section 38 with regard to notice is ignored with reference to a particular creditor, it would be unreasonable in such circumstances to hold that the scheme is binding on such a creditor. Further, when his name is not entered in the schedule of creditors, section 39 makes it quite clear that the scheme is not binding on him.

It is not open to an appellate Court to speculate as to what might or might not have happened if the creditor concerned had been given the opportunity to express his disapproval of the scheme. The appellate Court can only have regard to sections 38 and 39 of the Act, and if those provisions are not complied with, the creditor concerned cannot be held to be bound by the scheme.

Appeal under clause 15 of the Letters Patent against the judgment and order of Kunhi Raman, J., dated 7th April, 1943, and made in A. A. O. No. 22 of 1942, preferred against the order of the District Court of Nellore, dated 21st October, 1941, and made in I. A. No. 70 of 1942, in I. P. No. 50 of 1932.

*K. Umamaheswaram* for Appellant.

*P. V. Rajamannar, K. Subba Rao, C.A. Vaidyalingam* and *T. Venkatadri* for Respondents.

The Judgment of the Court was delivered by

*The Chief Justice.*—The question in this appeal is whether a creditor is bound by a scheme of composition approved of under the Provincial Insolvency Act entirely behind his back. On the 30th August, 1933, the first respondent was adjudicated an insolvent by the District Judge of Nellore. A proposal was made for the acceptance by the creditors of a scheme of composition which provided for the payment of six annas in the rupee. This scheme was sanctioned by an order of Court dated 18th April, 1935, whereupon the order of adjudication was annulled. The appellant, was a creditor. On the 29th October, 1934, he proved for the sum of Rs. 754-10-9 then due to him under a decree. The decree provided for the payment to him of future mesne profits. These were subsequently found to amount to Rs. 1,684-1-6. The appellant was given no notice of the proposal for a composition and the scheme was approved of without its being brought to his knowledge. On the approval of the scheme a Special Receiver was appointed to carry out its terms. The Special Receiver gave notice to the appellant. On the 21st January, 1941, the appellant applied to the Insolvency Court to be allowed to execute his decree. He contended that as the scheme had been sanctioned without notice to him, in spite of the mandatory provisions of section 38 of the Provincial Insolvency Act, he was not bound by it. He wished to have a declaration to this effect in order that he could proceed in execution without being hampered by the composition scheme. The District Judge held that his application was well founded and consequently granted it. The first respondent appealed to this Court and his appeal was heard by Kunhi Raman, J., who held that the District Judge was wrong. The learned Judge considered that the composition scheme was binding on the appellant, notwithstanding that it had been approved of without notice to him.

Sub-section (1) of section 38 of the Provincial Insolvency Act states that where a debtor after the making of an order of adjudication, submits a proposal

* L. P. A. No. 52 of 1943. 3rd March, 1944.

for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, the Court shall fix a date for the consideration of the proposal, and shall issue a notice to "all" creditors in such manner as may be prescribed. Sub-section (2) says that if, on the consideration of the proposal, a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, it shall be deemed to be duly accepted by the creditors. Sub-section (4) says that where the Court is of opinion, after hearing the report of the receiver, if a receiver has been appointed, and after considering any objections which may be made by or on behalf of any creditor, that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the Court shall refuse to approve the proposal.

Section 39, as it stood at the date of the approval of this scheme of composition, read as follows :

> "If the Court approves the proposal, the terms shall be embodied in an order of the Court and the Court shall frame a schedule in accordance with the provisions of section 33, the order of adjudication shall be annulled, and the provisions of section 37 shall apply, and the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any debts entered therein."

The directions in section 38 that notice shall be served on all creditors is mandatory and the section clearly contemplates that all the creditors shall have an opportunity of stating their objections to the scheme. It is true that here the scheme was approved of by the necessary majority of creditors, but the provisions of the section with regard to notice to the appellant was entirely ignored. It would be unreasonable in these circumstances to hold that the scheme is binding on the appellant; but even if this construction were open to question, section 39 makes it quite clear that the scheme is not binding on him. The section says that it is binding on all the creditors who are entered in the schedule. His name was not entered in the schedule. Therefore the scheme is not binding on him.

It may be mentioned that when the scheme was approved the Court was aware that the appellant was a creditor and set aside sufficient to pay him six annas in the rupee. It is astonishing that, notwithstanding its knowledge of the appellant's debt, the Court did not direct notice to him. Kunhi Raman, J., in setting aside the order of the District Judge, states that even if the appellant had been given notice and had expressed disapproval of the scheme, his voice would not have prevailed. This is an assumption which the learned Judge was not entitled to make. Unless the appellant had an opportunity of stating his reasons, it could not be said what weight that would carry. His reasons for opposing the scheme might have been so cogent that he would have carried the other creditors with him and have convinced the Court. An appellate Court is not entitled to enter into a speculation of this kind. It can only have regard to the provisions of section 38, and section 39, and if these provisions are to be observed, as they must be, it is clear that the appellant cannot be held bound by the scheme.

The appeal will be allowed with costs against the first respondent in this Court and before Kunhi Raman, J.

V.S. ——— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT AND MR. JUSTICE SHAHABUDDIN.

Kamma Chimbili Subbanna .. *Appellant**

*Special Criminal Courts Ordinance (II of 1942)—Special Judge trying a charge of offence under Defence of India Rules (1939)—Rules of procedure and evidence—Applicability—Criminal trial—Prosecution never to be supported by inadmissible evidence.*

Rule 23 of Ordinance II of 1942 by implication makes it clear that the rules of evidence apply to cases under the Defence of India Rules tried by Special Judges. The rule expressly provides for an exception to the rules of evidence in cases coming under section 164 of the Code of Criminal

* Cr. Appeal No. 438 of 1943. 8th September, 1943.

Procedure and therefore by implication the rules of evidence are applicable in other cases. Apart from that the rules of evidence would ordinarily apply unless expressly abrogated.

A prosecution case should never be supported by evidence which is patently inadmissible.

Appeal against the order of the Court of the Special Judge of the Anantapur Division in Ordinance Case No. 1 of 1942.

*K. S. Jayarama Aiyar* for *V. V. Chowdhary* for Appellant.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Judgment of the Court was delivered by

*Mockett J.*—This is an appeal against the conviction and sentence of rigorous imprisonment for five years by the learned Sessions Judge of Anantapur. The learned Sessions Judge, at the time of the trial, was sitting in his capacity as Special Judge trying an offence under the Defence of India Rules.

The accused was charged with an offence under rule 35 (A) (2) of the Defence of India Rules which reads :

> " If any person dishonestly receives or retains, or voluntarily assists in concealing or disposing of or making away with, any sabotaged property, knowing, or having reason to believe the same to be sabotaged property, he shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both."

" Sabotaged property " is defined in rule 35 (A) (1) as meaning :

> " property the possession of which has been transferred by, or in consequence of, any such act as is referred to in sub-rule (1) of rule 35."

and sub-rule (1) of rule 35 deals with acts of sabotage.

The facts are very simple. On the 15th August, 1942, there is no doubt that a goods train No. 405 was derailed as a result of some person or persons having removed the rails, and there can be no doubt that this was an act of sabotage, especially, having regard to the conditions then prevailing. Before the learned Special Judge 15 persons were charged with various offences, the gist of which was that they were responsible for the wrecking of the train. They were all acquitted. Against the present appellant there was a charge which reads as follows :

> " That you accused 16 between the 15th and the 24th days of August, 1942, at Kottala near Guntakal dishonestly received or retained sabotaged property, that is, the property lost in the goods train derailed on the night of the 15th August, 1942, knowing or having reason to believe the same to be sabotaged property and thereby committed an offence punishable under rule 35 (A) (2) of the Defence of India Rules and within my cognizance."

It will be observed that it was not conveyed to the appellant what property he is said to have had in his possession. The conduct of this case was throughout characteristic of the method in which the charge was framed. It appears however that it was at some stage conveyed to the appellant that he was in guilty possession of M. Os. 5, 10, 4, 3-a, 7, 3 and 6. He was acquitted with regard to M. Os. 5, 10, 4, 3-a, and 7. But he was found guilty by the learned Judge with regard to M. Os. 3 and 6. M. O. 3 consisted of four empty gunny bags and M. O. 6 was a bale of 250 empty gunny bags.

Possession being admitted, the prosecution had to prove in the first place that these were sabotaged goods. In other words the gunny bags had to be identified. With regard to M. O. 3, the four empty bags, two witnesses P. Ws. 7 and 8 were called. In the course of the evidence of P. W. 7, it was made clear that his firm of Ralli Brothers supplied to sellers fresh gunnies and that these were not fresh gunnies. There was evidence by the same witness that such gunnies were sold to the public and therefore might have been available to the appellant. He stated as follows :

> " I cannot say if M. O. 3 was issued to him (a Reddy dealer) . . . M. O. 3 bears no marks of any station from and to which the contents are booked. Nor do they bear the owner's name."

P. W. 8's evidence was to the effect that he could not identify M. O. 3 as among the lost bags because they had become black. The result of the evidence of these

witnesses was that they were not in a position to say that the four empty gunny bags marked M. O. 3 were ever in the sabotaged train at all. Nevertheless the learned Special Judge, in paragraph 16 of his judgment, stated as follows :

> " P. W. 7 the Sub-Agent of Ralli Brothers at Guntakkal gives evidence that M. O. 3 (Four empty gunny bags which bear the letters R F A N T U ) are the bags of the company."

In fact it has never been proved that M. O. 3, were sabotaged goods.

The position with regard to M. O. 6, is as follows. The witness called to identify them, P. W. 14, frankly admitted in the witness box that he was unable to do so and so informed the police. The police, instead of summoning from Calcutta persons who might have been in a position to identify these gunny bags the subject of M. O. 6, directed P. W 14, to enter into correspondence with Calcutta and as a result of that correspondence letters were put before the learned Judge which satisfied him that M. O. 6 were goods that were on the train that day and therefore sabotaged goods. Apart from the question of admissibility, the documents themselves do not identify the goods. The Mills who are said to have made them expressed the view that they in all probability might be of their manufacture, because bundles of their goods were marked in the same manner in blue ink as M. O. 6. It cannot be put higher than that. But it is obvious that this Ex. G series correspondence is not admissible at all. It is hearsay. An examination of the correspondence shows that the most important letter Ex. G-4 is not even from or to P. W. 14. It is a copy of a letter said to have been written by the Megna Jute Mills to Louis Dreyfus and Co., Calcutta. The only way in which the identity of M. O. 6 could be proved was by calling a witness to identify them The procedure adopted in this case with regard to the identification of these goods must be strongly condemned. There is a very special reason. This accused was a dealer in groundnuts and as such was in the habit of having in his possession very large quantities of gunnies. The evidence generally was that gunny bags circulated and accordingly it was not an unusual thing for him to have in his possession large quantities of gunny bags. He actually let in evidence to prove that he purchased these very bags. but although he did call witnesses for that purpose who identified the bags as being those sold, the learned Judge preferred to reject their evidence and to accept the inadmissible documentary evidence to which we have referred. We cannot help feeling that there was an impression in the Court below that the rules of procedure and evidence did not apply in these cases. Rule 23 of Ordinance II of 1942, by implication makes it clear that the rules of evidence apply because it expressly provides for an exception to the rules of evidence in cases coming under section 164 of the Code of Criminal Procedure. Apart from that it is obvious that the rules of evidence would ordinarily apply unless expressly abrogated.

The result of this case is that the appellant who protested his innocence and was able to show that he was a subscriber to war funds has suffered a long term of imprisonment. The appeal must be allowed. The Public Prosecutor has most properly made no attempt whatever to justify the conviction. We cannot part with the case without expressing regret that the Public Prosecutor of Anantapur placed the case before the Court in the manner in which he did. A prosecution case should never be supported by evidence which is patently inadmissible. Scrupulous fairness should have been shown in a case in which for a sentence of five years no appeal was then provided. The accused is on bail. His bail bond is cancelled. The fine which we understand has been paid will be refunded.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Ravula Chennayya (died) and others .. *Appellants**

*v.*

Thota Janikamma and another .. *Respondents.*

*Contract Act (IX of 1872), section 65—Trusts Act (II of 1882), section 84—Person bidding at an abkari auction—Contract entered into by other persons with him prior to the auction to share in the business to be obtained after successful bidding—Suit upon such contract—Illegality of contract.*

Some persons entered into a contract under which each of them was to advance a certain sum of money to the first defendant, who was to bid at an abkari sale to be held, and as consideration for the money paid by them they were to share in the business which the first defendant was to bid for. The first defendant did bid and obtained the business and it was alleged he also made profits. The plaintiffs brought a suit for dissolution of partnership and accounts.

*Held,* that on no ground could the plaintiffs, to any extent, succeed, as the contract was illegal and could not be sued upon. It makes no difference if the contract had been entered into before the auction and not subsequently.

Case-law discussed.

Appeals against the decree of the Court of the District Judge of Kistna at Chilakalapudi in A.S. Nos. 40 and 41 of 1942 respectively preferred against the decree of the Court of the District Munsif of Bezwada in O.S. Nos. 516 of 1937 and 88 of 1938 respectively.

*V. Parthasarathi* for Appellants.

*P. Somasundaram* and *G. Balaparameswari Rao* for Respondents.

The Court delivered the following

JUDGMENT.—It has been found by the Courts below that the appellants and others entered into a contract under which each was to advance a certain sum of money to the first defendant, who was to bid at an abkari auction sale to be held on that day, and as consideration for the money paid by them, they were to share in the business which the first defendant was to bid for. The first defendant did bid, and he conducted the business and—it is said—made profits. The plaintiffs brought the present suits for the dissolution of the partnership and accounts. Both the Courts below held that the contract was illegal and could not be sued on. The first Court, however, granted them relief under section 65 of the Contract Act. The appellate Court dismissed the suits in toto.

It is argued here that where the contract is entered into before the auction, it is not a contract which infringes the provisions of the Abkari Act and can therefore be sued on. It is only contracts entered into after the auction takes place, it is contended, that are illegal; because they amount to transfers of the interests of the licensee. This question has been considered by very many Judges on various occasions. Venkatasubba Rao, J., and Venkataramana Rao, J., sitting separately, held that that distinction could be made; but other Judges whose judgments have been referred to—Wadsworth, J., King, J., and Krishnaswami Ayyangar, J.—held otherwise. In *Rama Nayudu* v. *Seetharamayya,*[1] the question was with regard to a partnership which was established after the auction sale; but there can be no doubt that the learned Judges were of opinion that any partnership without sanction, whether entered into before the auction or after it, would be illegal. Beasley, C.J., who delivered the judgment of the Court, in discussing a judgment of Reilly, J., to the effect that it

*S.A. Nos. 1213 and 1335 of 1942. 26th January, 1944.

1. (1934) 68 M.L.J. 570: I.L.R. 58 Mad. 727 (F.B.).

was not illegal for persons to enter into a partnership for the purpose of carrying on a toddy shop business observed,

> "That is quite true if it is intended at a future date to get a licence in the name of all the partners."

Venkatasubba Rao, J., who delivered his judgment shortly after this decision, was considering a case similar to that under consideration here. He relied upon a judgment of Anantakrishna Ayyar, J., and said that the Full Bench had not dissented from it. The Full Bench however distinguished it on the ground that Anantakrishna Aiyar, J., was not satisfied that a partnership had been entered into. Venkatasubba Rao, J., was aware that his decision was not in accordance with the reasoning in, the Full Bench case, but he did not follow it because he was not bound to do so; for the point that directly arose for decision in the Full Bench case was different from the point in the case before him. The matter has, however, now been set at rest by the decision of a Bench of this Court in O.S.A. No. 18 of 1942,[1] in which the decision of Krishnaswami Ayyangar, J., was in substance upheld. In considering the judgment of Venkatasubba Rao, J., and Venkataramana Rao, J., it was pointed out that the learned Judges had overlooked the wider question of public policy and that it did not follow, because there was no transfer of interest, that the partnership would be a lawful one. The learned Judges say,

> "There can be no doubt that, on the decisions of this Court, the partnership between the plaintiff and the defendant would have to be declared unlawful *ab initio* if a full disclosure of the position had not been made to the Revenue authorities";

and because the partnership was not subsequently sanctioned, the learned Judges refused to allow the plaintiff an account after the time when it was found that the partnership was illegal. So there can be no doubt that this question was decided in the Original Side Appeal and that this case is an authority on the point now before me; because it was necessary for the determination of the matter before the Court.

It is argued, on the authority of the Full Bench decision, in *Sesha Ayyar* v. *Krishna Aiyar*,[2] that the plaintiff was entitled to a refund of the capital advanced under section 84 of the Trusts Act; but the point raised in this case was whether a subscriber to an illegal lottery was in *pari delicto* with the organisers of the chit fund. Clearly the position of a partner in an illegal partnership is very different from that of a humble subscriber to an illegal chit fund. It seems to me quite irrelevant that the appellant played but a minor part in the actual partnership business after the licence had been taken. His guilt lay in becoming a member of the illegal partnership in the first instance, when he was equally to blame with the other partners.

Section 65 of the Contract Act was also invoked for the purpose of procuring a refund of the money advanced by the appellant but although the section applies in general to void contracts as well as to voidable ones, it does not apply to contracts that are illegal. In *Srikakolapu Venkataraju* v. *Gudivada Ramanujam*,[3] the question was apparently whether a person who had entered into a wagering contract and had given a certain sum of money by way of security for the fulfilment of his agreement, was entitled to receive that money back again. It was held that he was; but at the same time the learned Judges said that section 65 of the Contract Act did not apply. In *Suryaprabhakara Rao* v. *Gammudu Sanyasi*,[4] section 65 of the Contract Act was invoked. There, although the contract was found to be illegal, yet the money was ordered to be refunded. From one point of view, however, the contract was merely void and not illegal; because it purported to transfer a right in

1. (1944) 1 M.L.J. 97.
2. (1935) 70 M.L.J. 36: I.L.R. 59 Mad. 562 (F.B.).
3. (1917) 34 M.L.J. 561.
4. (1925) 48 M.L.J. 598.

land that might never come into existence, a transfer of a mere expectation of property. In such a case, section 65 would apply.

Finally, on the authority of *Srikakolapu Venkataraju* v. *Gudivada Ramanujam*,[1] it is argued that even though section 84 of the Trusts Act and section 65 of the Contract Act will not apply, there is a general principle of law whereby a person who has money which belongs to another, can be made to return it. That can only be done however, when the money is not tainted with the illegality of the contract. The money held by a stake-holder is one example. In the case dealt with in *Srikakolapu Venkataraju* v. *Gudivada Ramanujam*,[1] the sum of money in question was not paid in pursuance of the illegal contract but by way of security. The return of the money was refused in *Rama Nayudu* v. *Seetharamayya*.[2] In *Sesha Ayyar* v. *Krishna Ayyar*,[3] the money was returned only on the ground that section 84 of the Trusts Act would apply, while in *Suryaprabhakara Rao* v. *Gammudu Sanyasi*,[4] the money was returned because section 65 of the Contract Act applied. Moreover, in this case, the sum of money no longer exists; for in pursuance of the contract, the money advanced by the appellants was utilised in the business.

On no ground, therefore, can the plaintiffs to any extent succeed. The appeals are dismissed with costs. Advocates's fee in S.A. No. 1213 only.

K. C. — *Appeals dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL.

Thangachami Chettiar .. *Appellant**

*v.*

Minor Kanagasabapathi and others .. *Respondents.*

*Hindu Law—Suit on a promissory note against father and sons—Sons exonerated—Partition between father and sons between decree and subsequent attachment of property—Whether sons' shares are not subject to attachment and sale.*

Where in a suit by a creditor on a promissory note against a father and his sons, a decree was passed against the father alone and the sons were exonerated, and between the date of the decree and the date of attachment in execution of the properties of the judgment-debtor and his sons there was a partition among them, on the question whether the sons' shares were not attachable by reason of the intervention of the partition,

*Held*, that the sons' shares were attachable.

*Doraiswami* v. *Nagaswami*, A.I.R. 1929 Mad. 898 and *Subramania Aiyar* v. *Sabapathy Aiyar*, (1927) 54 M.L.J. 726; I.L.R. 51 Mad. 361 (F.B.) followed.

*Thirumalamuthu* v. *Subramanya*, (1937) 1 M.L.J. 243; distinguished.

Appeal against the order of the District Court of Ramnad at Madura dated 28th January, 1943 and made in E.A. No. 99|42 in E.P. No. 8|42 in O.S. No. 43|35, (Madura Sub-Court).

*T. L. Venkatrama Ayyar* for Appellant.

*B. Pocker* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant in this appeal is the decree-holder in O.S. No. 43 of 1935 of the Madura Subordinate Judge's Court. That suit was brought on a promissory note against the first defendant and his sons, defendants 2 to 4. A decree was passed against the first defendant alone, the sons having been, as it was called, exonerated. In execution of this decree the appellant-plaintiff attached the properties of both the father and the sons. Between the passing of the decree and the attachment a partition had been effected between the first defendant and his sons. Against this attachment the sons filed an application (out of which this appeal arises) to have the attachment set aside and the sale stopped as far as their shares were concerned. The contention put forward by the sons was that their shares were not attachable by reason of the intervention of the partition between the decree and the pro-

1. (1917) 34 M.L.J. 561.
2. (1934) 68 M.L.J. 570: I.L.R. 58 Mad. 727 (F.B.).
3. (1935) 70 M.L.J. 36: I.L.R. 59 Mad. 562 (F.B.).
4. (1925) 48 M.L.J. 598.

*A.A.O. No. 278 of 1943. 21st January, 1944.

n of Varadachariar, J., sitt

and on the decision of King,
ami Goundan[2]. He also repelled the co
rtition was in any case fraudulent, on the
have to be agitated in a separate suit and not

r, J., in *Thirumalamuthu* v. *Subramania,*[1] no doubt held
ecree on a promissory note executed by a father had been
the father alone, the remedy of the decree-holder against the
where a partition between the father and the sons had been
the decree had been passed and before the execution was taken
a separate suit and not in execution proceedings.

the appellant it is argued that the present case is distinguishable be-
the sons, although exonerated, were parties to the suit, whereas the sons
*hirumalamuthu* v. *Subramania,*[1] were not impleaded at all; and my at-
tion has been drawn to the decision of a Bench of this Court in *Doraiswami*
*Nagaswami,*[3] which, it is said, is direct authority for the view that, where
he sons have been made parties to the suit, even though exonerated, their property may be attached in execution of the decree, even though a partition has been effected between them and their father before attachment is sought to be effected. This decision was referred to by Varadachariar, J., in *Thirumalamuthu* v. *Subramania*[1] and it seems clear that he would have considered himself bound by it, had it not been for the fact that in the case before him not only was the decree against the father alone but the sons had not been made parties to the suit. It is contended for the respondents-defendants that the decision in *Doraiswami* v. *Nagaswami*[3] is no more than that a decree-holder may execute a decree obtained against the father against the shares of the sons also, even though the sons have been exonerated from the suit. The learned Judges who decided the case, it is said, had not in mind the question of whether execution against the sons' shares could be taken out after a partition between them and their father. It is not possible to accept this contention. The questions considered in the appeal were, first, whether the partition had been effected before the promissory note was executed by the father, and in that case of course the promissory note could not be binding on the shares of the sons, and, secondly, whether, if the partition was effected after the execution of the promissory note, the shares of the sons were none the less not liable to be sold in execution proceedings against the father. With regard to the first point it was held that the partition was effected after the execution of the promissory note, and, as already stated, with regard to the second point it was held that the sons' shares were liable to be proceeded against by way of attachment and sale. In fact, the partition which was held by the Court to have been effected by a compromise decree in 1914 was long prior to the attachment and sale of the sons' shares which was on the 1st February, 1919. On the face of it, therefore, it would appear that the learned Judges who decided the case must have had in mind not only the question of whether the exoneration of the sons from the suit precluded the decree-holder from proceeding against their shares in execution on the pious obligation principle but also whether the fact of the partition, even though execution might otherwise have been taken against them, precluded the attachment of their shares. That in fact the learned Judges did not overlook the fact that the attachment and sale were after the partition and that the partition was an element that had to be considered is made clear by their reference to the observations of Anantakrishna Ayyar, J., in his judgment in the Full Bench case reported in *Subra-*

1. (1937) 1 M.L.J. 243.
2. (1942) 2 M.L.J. 361.
3. A.I.R. 1929 Mad. 898.

rights of the decree-holder a
quoting the observations of A
could not by obtaining a decree. against
s were not parties proceed to execute the d
s all to the sons under the partition, then went o
observat is did not cover the case before them since the s
which they were concerned were made parties to the sui
therefore, the decision in *Doraiswami* v. *Nagaswami*[2] covers
and, as I am bound by it, the order of the learned District J
aside and the appeal allowed with costs.

The petition will be restored to file and determined by the
on the merits. The costs in the lower Court will abide the result.

V. P. S. —— *Appeal*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AYYAR.

Chundru Venkanna .. *Appellant**

*v.*

Chundru Brahmadu and others .. *Respondents.*

*Limitation Act (IX of 1908), Article 11—Applicability—Settlement of sale proclamation—Mortgagee of property denying decree-holder's allegation that the mortgage was collusive and praying for sale subject to his mortgage—Settlement of sale proclamation notifying the mortgage with the remark that it was alleged to be collusive—Suit on mortgage after one year of settlement of proclamation—Barred under Article 11 of the Limitation Act—Civil Procedure Code (V of 1908), Order 21, rule 63—Applicability.*

In filing certain sale papers in connection with the execution of a decree for the payment of money, the decree-holder referred to the existence of two mortgages on the property but stated that they were collusive transactions. On this, notice was ordered to the mortgagees. One of them appearing in answer to the notice filed a petition stating that the mortgage in his favour was a true one and that it was fully supported by consideration and asked the Court for directions that the sale of the property should be held subject to his mortgage. The Court ultimately directed in settling the draft proclamation that the particular mortgage and another should be notified at the time of the sale with the remark that the decree-holder alleged that they were collusive. In a suit on the mortgage filed more than one year after that date,

*Held*, that the provisions of Order 21, rule 63 of the Civil Procedure Code will be attracted even in cases of applications filed by mortgagees in the course of the settlement of the sale proclamation.

*Ponnuswami Pillai* v. *Samu Ammal*, (1916) 31 M. L. J. 247; *Lakshmanan Chettiar* v. *Parasivan Pillai*, (1919) 37 M.L.J. 159 and *Velu Padayachi* v. *Arumugham Pillai*, (1919) 38 M.L.J. 397, relied on.

Where when the mortgagee prayed for an order that the property should be sold subject to his mortgage the Court did not grant him that relief, though it did not decide the question of the genuineness of the mortgage, the suit on the mortgage more than one year after the order was barred under Article 11 of the Limitation Act.

*Cannanore Bank, Ltd.*, v. *Madhavi*, (1941) 2 M.L.J. 956: I.L.R. 1942 Mad. 336 (F.B.), applied

Appeal against the decree of the Court of the Subordinate Judge of Ellore in A.S. No. 176 of 1942 preferred against the decree of the Court of the District Munsif of Tanuku in O.S. No. 82 of 1941.

*K. Bhimasankaram* for Appellant.

*C. Rama Rao* for Respondents.

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1. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).
2. A.I.R. 1929 Mad. 898.

*S.A. No. 888 of 1943. **10th March, 1944.**

The Court delivered the following

JUDGMENT.—The appellant sued upon a mortgage, but the suit was dismissed as barred under Article 11 of the Limitation Act. In filing certain sale papers in connection with the execution of a decree for the payment of money, the decree-holder referred to the existence of two mortgages on the property but said that they were collusive transactions. On this, notice was ordered to the mortgagees. One of them, the present plaintiff Chundru Venkanna, appearing in answer to the notice, filed a petition, called by the very familiar but wholly wrong name "counter" stating that the mortgage in his favour was a true one and that it was fully supported by consideration and asking the Court for directions that the sale of the property to be held at the instance of the plaintiff decree-holder should be held subject to his mortgage bond. The Court posted the matter for inquiry on 4th December, 1935, heard the parties on that date, said that the question would be considered at the time of the settlement of the proclamation on 7th December, 1935, and finally directed in settling the draft that this mortgage and another should be notified at the time of sale but with the remark that the decree-holder alleged that they were collusive. This remark is found at the very end of the proclamation as finally settled, Ex. D-2. The present suit was filed more than one year after that date. The Subordinate Judge has differed from the District Munsif and held that the suit was barred under Art. 11 of the Limitation Act.

It was urged for the appellant that the case did not fall under Order XXI, rule 58, Civil Procedure Code, as there was no claim preferred by the appellant or objection raised to the attachment and that an order made in the course of settling the terms of the sale proclamation under rule 66 is not an order of the kind referred to in rule 63, when alone Art. 11 will apply. This, however, is not correct. Under rule 66 it is the duty of the Court after such inquiry as may be necessary to specify any encumbrances to which the property is liable and for this purpose it has got the right to summon and examine any person if necessary. In the course of such an inquiry, if a mortgagee prefers a claim on the basis of his mortgage, the Court has to investigate it so that the sale proclamation that issues over its name and authority should be correct as far as possible. Order XXI, rule 62 provides for a case where the objection is not really on the ground that the property is not liable to attachment but is merely to the effect that the mortgage or charge should be notified so that intending purchasers might know of its existence and realise that what is being sold is only the equity of redemption. That the provisions of Order XXI, rule 63 will be attracted even in cases of applications filed by mortgagees in the course of the settlement of the sale proclamation, is laid down in *Ponnuswami Pillai* v. *Samu Amma*[1], *Lakshmanan Chettiar* v. *Parasivan Pillai*[2] and *Velu Padayachi* v. *Arumugham Pillai*[3]. It is not necessary that the mortgagee should come before the Court as a claimant or objector under Order XXI, rule 58. In the present case, when notice went to him, the appellant filed a petition challenging the allegation that his mortgage was a collusive affair and prayed for an order that the property should be sold subject to his mortgage. The Court did not grant him this relief for it directed the issue of the sale proclamation subject to the remark that the mortgage is challenged as collusive. True it did not decide the question of the genuineness of the mortgage but it is equally true that it did not award the relief that the plaintiff wanted to be given. The case, though a hard one, falls within the principle laid down in *Cannanore Bank, Ltd.* v. *Madhavi*,[4] where a more or less similar case as the present one, *President, Co-operative Credit Society, Kaikaran*

1. (1916) 31 M.L.J. 247.
2. (1919) 37 M.L.J. 159.
3. (1919) 38 M.L.J. 397.
4. (1941) 2 M.L.J. 956: I.L.R. 1942 Mad. 336 (F.B.).

v. *Narasimharao*,[1] which was decided by two of the three Judges who took part in the Full Bench was overruled by themselves as wrong.

The second appeal is dismissed with costs.

Leave refused.

K. S. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL.

S. P. S. Subramaniam Chettiar by authorised agent, K. P. Subramania Aiyar .. *Appellant**

*v.*

Maruthamuthu by authorised agent Karuppanna Pandithan .. *Respondent.*

*Limitation Act (IX of 1908), section 13 and Article 117—Foreign judgment—Payment towards decree debt—Extension of time—Suit on foreign judgment—Bar of limitation.*

The plaintiff filed a suit on a promissory note in the District Court of Muar in the Federated Malay States and obtained a decree on 21st July, 1930. Various payments were made by the defendant towards discharge of the decree, the last being on 12th June, 1938. On 28th February, 1940, the plaintiff sued in the British Indian Court to enforce the foreign judgment.

*Held*, that the suit was time-barred under Article 117 of the Limitation Act and that limitation was not saved by reason of the payments in discharge of the decree of the foreign Court. The provisions of section 13 of the Limitation Act are attracted only when the cause of action has arisen in British India.

*Rathina Thevan* v. *Pakkiriswami Tevan*, A.I.R. 1928 Mad. 1088, relied on.

Appeal against the decree of the District Court of Salem in A.S. No. 148 of 1941 preferred against the decree of the Court of the District Munsif of Namakkal in O.S. No. 70 of 1940.

*K. Rajah Ayyar* and *K. S. Ramamurthi* for Appellant.

*R. Desikan* for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of O.S. No. 70 of 1940 in the Court of the District Munsif of Namakkal, a suit upon a foreign judgment. The question is whether the suit was barred by limitation. The plaintiff in the suit is the appellant. The defendant who was a permanent resident of Kalappanaickenpatti village within the jurisdiction of the Court of the District Munsif of Namakkal and temporarily residing at Muar in the Federated Malay States had borrowed 1356 dollars from the plaintiff on a promissory note. The plaintiff filed C.S. No. 81 of 1930 in the District Court of Muar and obtained a decree on 21st July, 1930. Various payments were made by the defendant towards the discharge of this decree, the last being on 12th June, 1938. On 10th January, 1940, a sum of 786 dollars 12 cents was found due and on 28th February, 1940, the plaintiff filed the present suit to enforce the foreign judgment. Article 117 of the Limitation Act provides a period of limitation of six years from the date of the foreign judgment, and, as the foreign judgment was pronounced on 21st July, 1930, the suit was on the face of it barred. The plaintiff, however, contended that limitation was saved by reason of the fact that under section 13 of the Indian Limitation Act

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1. (1940) 2 M.L.J. 402.

*S.A. No. 600 of 1943. 3rd March, 1944.

he was entitled to deduct the period during which the defendant was residing out of British India and he also argues now, although it is not clear that this argument was put forward in the lower Courts, that in any case limitation will start to run from the date of the last payment in discharge of the decree of the foreign Court, namely, 12th June, 1938. The learned District Munsif held that the suit was in time and passed a decree accordingly. On appeal, however, his decree was reversed by the District Judge of Salem, and the suit was dismissed.

The District Munsif considered that the plaintiff was entitled to deduct the period during which the defendant was absent from India, which admittedly was ever since the suit in the Muar Court had been filed. He referred to the decision of a Bench of this Court in *Rathina Thevan* v. *Pakkiriswami Thevan,*[1] but distinguished it from the present case. The District Judge rather surprisingly made no reference to *Rathina Thevan* v. *Pakkiriswami Thevan,*[1] and although, in my opinion, his decision was right, it is not easy to see on what grounds he based it. He says only that it is extremely doubtful whether section 13 of the Indian Limitation Act was ever intended to apply to a case, like the present where both the parties were absent throughout from British India and where the cause of action arose and was prosecuted in a foreign Court.

In my judgment *Rathina Thevan* v. *Pakkiriswami Thevan*[1] is clear authority for the view that the provisions of section 13 of the Indian Limitation Act are only attracted when the cause of action has arisen in British India. In distinguishing the case, the learned District Munsif has referred only to one part of the judgment. The question was not merely whether the plaintiff in the suit in question was entitled to the benefit of section 14 but also whether he was entitled to deduct the period during which the defendant had been absent from British India. I am bound by the decision in *Rathina Thevan* v. *Pakkiriswami Thevan,*[1] and no purpose is served by considering whether other High Courts have or have not taken a different view.

Article 117 of the Indian Limitation Act provides a period of limitation of six years for a suit upon a foreign judgment as defined in the Civil Procedure Code, and states that the time from which the period begins to run is the date of the judgment. It is argued for the appellant that the suit, although in name a suit on a foreign judgment is in essence a suit to recover the amount due on the promissory note executed by the defendant in the plaintiff's favour, so that as would be the case in a suit on a promissory note, the starting point of limitation is not the date of the judgment but the date of the last payment which saves limitation. There is nothing in this contention. The debt has become merged in the decree, and a fresh cause of action for a suit on the foreign judgment is given by the decree. The payments in execution of the decree are only relevant to any period of limitation which might be given by the law of the country in which the decree was passed in respect of proceedings in execution. They have no bearing on the period of limitation in regard to a suit brought in British India upon the foreign judgment.

The appeal therefore fails and is dismissed with costs. (Leave to appeal is refused).

B. V. V. ——— *Appeal dismissed.*

1. A.I.R. 1928 Mad. 1088.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL.

The Public Prosecutor, Madras .. *Appellant**

*v.*

A. C. Kuppuswamy .. *Respondent.*

*Madras Motor Vehicles Act (III of 1931), section 7—Hirer of motor vehicle passing it to military authorities under an agreement—Liability to prosecution for non-payment of tax, as person having possession of vehicle.*

The accused was a contractor for the third Madras Regiment at Bellary which had hired a motor vehicle from him from 13th December, 1942 to 24th December, 1942. The accused had hired the vehicle from its owner before passing it to the military authorities. In a prosecution for non-payment of tax due on the vehicle for that quarter,

*Held,* that although the accused was neither in "possession nor in control" while the vehicle was in the custody of the military authorities, he was certainly in possession for some period during the quarter in respect of which the tax had to be paid before he handed over the vehicle to the military. Technically, therefore, he was a person having possession within the meaning of section 7 of the Madras Motor Vehicles Taxation Act, and was punishable by fine as the tax had not been paid in respect of the motor vehicle during the quarter.

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (accused) by the Stationary Sub-Magistrate of Bellary in C.C. No. 378 of 1943 on his file.

The Public Prosecutor (*V. L. Ethiraj*) in person.

*A. T. Sundaravaradan* for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the Government against the acquittal of the accused in C.C. No. 378 of 1943 in the Court of the Stationary Sub-Magistrate, Bellary. The charge was under section 7 of the Motor Vehicles Taxation Act. That section says—

"If the tax due in respect of any motor vehicle has not been paid, the registered owner or the person having possession or control thereof shall be punishable with fine which may extend to 50 rupees; and the amount of the tax due by him in respect of such vehicle for the quarter or quarters concerned shall also be recovered as if it were a fine."

The accused was a contractor for the third Madras Regiment then at Bellary and the regiment under the agreement, Ex. A, had hired a vehicle from him from 13th December, 1942 to 24th December, 1942. This vehicle belonged to a certain Kalappa of Bellary, and the accused had hired it from Kalappa before passing it on under Ex. A to the military authorities. Exactly when he hired it from Kalappa or for how long a period does not appear. The Stationary Sub-Magistrate took the view that the accused was not during this period, 13th December, 1942 to 24th December, 1942 in possession or control of the vehicle, and, as he was not the registered owner, he acquitted him.

In my opinion the Magistrate was right in his view that the accused was not in possession of the vehicle or control of it during the actual period in which it was in the custody of the military authorities under the agreement, Ex. A. There can be no question, I think, of a constructive possession as the person having possession must be somebody different from the registered owner and the terms of the agreement, in my opinion, make it impossible to accept any contention that during the period the contractor was in control. It is quite plain, however, that although the accused was neither in possession nor in control while the vehicle was in the custody of the military authorities under the agreement, he was certainly in possession for some period during the quarter in respect of which the tax had to be paid before he handed the vehicle over to the military. Technically, therefore, he was a person having

*Crl. Appeal No. 79 of 1944. 23rd March, 1944.

possession within the meaning of section 7 and as such punishable by fine as the tax had not been paid in respect of the motor vehicle during the quarter.. There are no facts on the record which enable me to say whether the tax might not have been more equitably recovered either from the registered owner or from the military authorities rather than from the accused. It is not clear whether he had hired the vehicle from Kalappa for a much larger period than the period during which it was in the possession of the military authorities or not.

It appears that this case was tried as a test case, there being many other cases against the accused in respect of vehicles which he had hired to the military authorities.

In the view I have taken the accused must be convicted of an offence under section 7 of the Motor Vehicles Taxation Act, but, as far as punishment is concerned, a nominal fine of four annas will meet the case.

K. S. — *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE HAPPELL.

Reddi Krishnamurthi (L.R. of defendant 2) and others .. *Appellants**

*v.*

Reddi Seshayya (died) and others .. *Respondents.*

*Hindu Law—Widow—Surrender of interest—Device to partition the estate and not a* bona fide *transaction—Effect on its validity.*

*V* died in 1898 and his widow obtained a widow's estate in the properties left by him. She executed a deed on 15th May, 1937, in favour of *V's* sister's son X purporting to surrender the whole of her widow's estate. The deed was not registered until the 13th August of the same year. Between the 10th August, 1937, and the 12th August, 1937, *X* purported under various deeds to sell many of the properties covered by the surrender deed to various persons and those deeds also were registered on the same date as the surrender deed. *V's* paternal uncle's sons then sued for a declaration that the surrender executed by the widow was not binding on them. The evidence showed that the alienations by *X* were *benami* for the widow's brother's son.

*Held*: The surrender deed, the retention of some of the properties covered by it by the surrenderee and the alienation of the rest by him *benami* for the brother's son of the widow, all formed part of the same transaction. In the circumstances, the surrender was not a *bona fide* transaction and the whole arrangement was only a device to divide the estate so as to give a part of the estate to the widow's brother's son in order that *X* might get the remainder *in presenti.* Accordingly the surrender was not binding on the reversion.

*Rangaswami Goundan* v. *Nachiappa Goundan,* (1918) 36 M.L.J. 493: L.R. 46 I.A. 72: I.L.R. 42 Mad. 523 (P.C.), followed.

*Subbiah Sastri* v. *Pattabhiramayya,* (1908) I.L.R. 31 Mad. 447 and *Sureshwar Misser* v. *Maheshrani Misrain,* (1920) 39 M.L.J. 161: L.R. 47 I.A. 233: I.L.R. 48 Cal. 100 (P.C.), explained and distinguished.

*K. Umamaheswaram* for Appellants.

*C. Rama Rao* for Respondents.

Appeal against the decree of the District Court of West Godavari at Ellore in A.S. No. 258 of 1938 preferred against the decree of the Court of the Subordinate Judge of Ellore in O.S. No. 34 of 1937.

The Judgment of the Court was delivered by

*Happell, J.*—This is an appeal against the decree and judgment of the District Judge of West Godavari reversing in appeal the decree of the Additional Subordinate Judge of Ellore in O.S. No. 34 of 1937. In that suit the seven plaintiffs sued for a declaration that a surrender deed executed by the first defendant on 15th May, 1937, in favour of the second defendant was not binding on them. The plaintiffs are the sons of the sons of a certain Brahmanna who was the brother of one Ganganna and so the uncle of Ganganna's

*S.A. No. 1217 of 1942. 29th March, 1944.

son, Venkatarayudu. There had been a partition between Ganganna and Brahmanna and on the death of Venkatarayudu in 1898 his widow, the first defendant, obtained a widow's estate in the properties left by him. The second defendant was Venkatarayudu's sister's son; and the third defendant was the first defendant's brother's son and had been brought into her house to manage her affairs for her. In the suit the plaintiffs raised two main contentions. They said that Venkatarayudu had adopted one Narayanamurthi who had died shortly after Venkatarayudu himself so that they and not the second defendant are the nearest reversioners to Venkatarayudu's estate. Both the lower Courts held that there had been no adoption by Venkatarayudu of Narayanamurthi and consequently this question is not now before us. The second contention raised was that the surrender deed executed by the first defendant in favour of the second defendant was not valid in law. This deed, Ex. I, was executed on 15th May, 1937, and purported to be a surrender of the whole of Venkatarayudu's properties in which the first defendant held a widow's estate in favour of the second defendant. Although executed on the 15th of May, 1937, it was not registered until the 13th of August of the same year. Between 10th of August, 1937, and the 12th of August, 1937, the second defendant purported under various deeds to sell many of the properties covered by Ex. I to defendants 4 to 20. These deeds were registered on the same date as the surrender deed, Ex. I, namely the 13th August, 1937. The learned Additional Subordinate Judge held that all the alienations made by the second defendant were true and valid except one evidenced by the deed Ex. V in favour of the 15th defendant which, in his opinion, was intended for the benefit of the first defendant herself. Applying, however, the rule that, notwithstanding the fact that a widow may have retained for her maintenance a small portion of the properties comprising her widow's estate, a surrender by her in favour of the nearest reversioner of the whole of the rest of the property will be regarded as a complete surrender of all her interest and valid in law, he held that the surrender deed, Ex. I, was valid and binding on the plaintiffs and so dismissed the suit. The learned District Judge, however, took the view that all the alienations were *benami* transactions intended for the benefit of the third defendant and that the alienation in favour of the 15th defendant was not distinguishable from the other alienations. In this view he allowed the appeal and decreed the suit for the plaintiffs.

The question for our decision is, therefore, whether in the circumstances of this case, the deed of surrender of the 15th May, 1937, is valid in law. As this is a second appeal, the finding of the learned District Judge that the alienations made by the second defendant between the 10th and 12th of August, 1937, were *benami* for the third defendant cannot be challenged. In our judgment, however, having regard to all the circumstances of the case, there is no reason to doubt that the view formed by the learned District Judge in this matter was correct. The case must therefore be regarded from the point of view that the surrender deed, the retention of some of the properties covered by the surrender deed by the second defendant himself, and the alienation of the rest *benami* for the third defendant, all form part of the same transaction. That the several transactions cannot be separated we think is clear from the fact that the surrender deed was registered on the same day as the deeds alienating a considerable part of the property surrendered, from the evidence of the second defendant himself which shows that he was by no means the prime mover in the transactions, and from the fact that the surrender deed, as is proved by the evidence of one of the alienees, the 15th defendant, has throughout been in the possession of the 15th defendant and not in that of the second defendant.

The result of a consideration of the decided cases as to the power of a Hindu widow to deal with the property of her husband to which she has suc-

ceeded for a life estate on his death has been summarised by Lord Dunedin in the case of *Rangaswami Goundan* v. *Nachiappa Goundan*,[1] as follows,

"An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender and not a device to divide the estate with the reversioner."

The argument advanced for the appellants is that the surrender in the present case is valid because it is a surrender of the whole estate and the surrender cannot be regarded as a device to divide the estate with the reversioner since the reversioner has not retained her interest in any of the property. In support of the contention we have been referred to the decision of a Division Bench of this Court in the case of *Subbiah Sastri* v. *Pattabhiramayya*.[2] In that case the whole of the widow's limited estate was conveyed to the next reversioner. Two days after the conveyance the next reversioner conveyed the greater part of the properties to the brothers of the widow, and thus fulfilled an undertaking which he had given to the widow. The surrender was held to be valid. Whether in view of the subsequent pronouncements of the Judicial Committee in *Rangaswami Goundan* v. *Nachiappa Goundan*[1] and *Sureshwar Misser* v. *Maheshrani Misrain*,[3] the decision was correct may be doubted. The facts, however, clearly distinguished the case from the case with which we are dealing. The decision was based on the fact that there was an absolute surrender of the widow's estate to the reversioner which put him in a position to give a good title to a third party—the undertaking being regarded as relating only to the motive which actuated the widow and so irrelevant since, despite it, the reversioner could have retained the property for himself or conveyed it to whomsoever he pleased. In the present case the arrangement was one and indivisible, and avoided the possibility that the reversioner might not fulfil the arrangement after the surrender to him had been made.

The only other case to which reference need be made is the case of *Sureshwar Misser* v. *Maheshrani Misrain*,[3] decided by the Privy Council. It is argued for the appellants that this case supports the contention that a surrender by a widow of the whole of her limited interest may be validated even though the estate is divided between the next reversioner and third parties in such a way as not to give the reversioner, as in *Subbiah Sastri* v. *Pattabhiramayya*,[2] at any time, the power to alienate the property to any other person than the person designated by the arrangement. In our opinion, if the facts in *Sureshwar Misser* v. *Maheshrani Misrain*,[3] and the reasoning by which the decision is supported are examined the decision is no authority for the position contended for. The facts of the case were that a Hindu subject to the Mithila law left him surviving a widow, four daughters and a son. The son died soon after the father and under a will made by him the daughters succeeded to the immovable property and obtained possession of it. The next reversioner however filed a suit for a declaration that the property being joint the will was inoperative, that on the death of the son the mother obtained a widow's estate in the property and that on her death it would devolve on the then nearest reversioner. The suit was compromised and the effect of the compromise was that the will was given up and the daughters and the nearest reversioner each took a half of the immovable properties. The movable properties were retained by the mother who in any case was entitled to them absolutely under the Mithila law. Once the will was given up, the mother became entitled to a life interest in the immovable properties, so that the compromise amounted to a surrender by her of the immovable properties and the

1. (1918) 36 M.L.J. 493: I.L.R. 42 Mad. 523: L.R. 46 I.A. 72 (P.C.).
2. (1908) I.L.R. 31 Mad. 447.
3. (1920) 39 M.L.J. 161: I.L.R. 48 Cal. 100: L.R. 47 I.A. 233 (P.C.).

division of them in equal halves between the daughters and the nearest reversioner. Lord Dunedin in his judgment said,

"An arrangement by which a reversioner as consideration for the surrender promised to convey a portion of the property to a nominee or nominees of the lady surrendering, might well fall under the description of a device to divide the estate."

This observation makes it clear that the basis of the decision was not that the surrender was valid because the division was between the reversioner and third parties and consequently not a device to divide the estate with the reversioner. This is made clear by the succeeding sentence of the judgment in which Lord Dunedin observed that it was here that the fact of the arrangement being a compromise became of importance. Being a compromise it was a good consideration for the lady's relinquishment of her interest to avoid the possibility of an adverse decision and a litigation in the course of which the estate would probably be much diminished; and it was a good consideration for the reversioner's surrender of half the property to the daughters that he got rid of the will and avoided the possibility that the daughters might take all. The surrender therefore was a *bona fide* surrender and not merely a device to divide the estate. If it had been a device to divide the estate, there can be no doubt, having regard to the observations of Lord Dunedin, that it would have been held that the surrender was invalid notwithstanding the fact that the division of the property was not directly between the reversioner and the mother. In the present case, however, on the facts found, the surrender clearly was not a *bona fide* surrender. The whole arrangement was simply a device to divide the estate and the second defendant gave up a part of the estate to the third defendant in order that he might get the remainder *in presenti*. In our opinion therefore the decision of the learned District Judge is correct.

The appeal is dismissed with costs.

K. S. *Appeal dismissed.*

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## [FULL BENCH.]

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE LAKSHMANA RAO.

Ganeshmul Sait and another .. *Appellants**

*v.*

Muhammad Ismail Sahib and another .. *Respondents.*

*Civil Procedure Code* (*V of* 1908), *Order* 21, *rule* 53 (1)—*Decree in original suit in favour of judgment-debtor in a small cause suit—Both decrees passed by the same District Munsiff—Application for execution of small cause decree by attachment of decree in original suit—Order allowing—Failure of Munsiff to issue a notice in writing in his capacity as small cause Judge to himself exercising original jurisdiction—Effect—Right of attaching decree-holder to execute the attached decree in the circumstances—Whether a creditor who has attached merely the debt and applying for execution of the decree on the debt can ask for an amendment of his execution petition by asking for an attachment of the decree except in the Court which passed the decree in his own favour.*

*A* obtained a mortgage-decree against *B* and *C* on the original side of the District Munsiff's Court. In a small cause suit in the same Court *D* obtained against *A*, a decree which he sought to execute by the attachment of the mortgage-decree. On *D's* application for execution the District Munsiff as small cause Judge issued an order on *A*, prohibiting him from receiving the decree-debt until further orders of the Court and an order on *B* and *C*, prohibiting them from paying the debt. The Munsiff then ordered the mortgage-decree to be attached and ultimately after the parties in the mortgage suit had been served with the prohibitory orders he made the attachment absolute. *D* applied in due course in execution to the District Munsiff as exercising ordinary original jurisdiction for leave to proceed to execute

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*A.A.A.O. No. 190 of 1943. 21st February, 1944.

the attached decree. The objections raised by *B* and *C* were overruled and an order permitting *D* to execute *A's* decree was passed. The order was confirmed on appeal and on second appeal it was again contended that there was no sufficient compliance with the provisions of Order 21, rule 53 of the Civil Procedure Code in that no notice in writing was issued to the Court in which the decree sought to be executed was passed, and that therefore there was no valid attachment which will enable *D* to proceed with the execution of the mortgage-decree.

*Held,* that the object of Order 21, rule 53 of the Civil Procedure Code is, to prevent the holder of a decree executing it to the detriment of the person who has obtained a decree against him. The notice contemplated by Order 21, rule 53 (1) merely prevents the execution being proceeded with until the notice contemplated by the clause is cancelled or the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving the notice to execute the attached decree.

The position in the present case was that *D* applied to the proper Court for an order of attachment of the decree and he applied to the proper Court to be allowed to execute the attached decree. Supposing the Munsiff as the Judge of Small Causes had served upon himself as Munsiff having original jurisdiction, a written notice under rule 53 (1) (*b*) the notice would have expired as soon as *D* applied in that suit to be allowed to proceed in execution. To say that there was no valid attachment because there was no written notice issued by the Munsiff as the Judge of Small Causes to himself as the Munsiff having original jurisdiction would be pushing technicality beyond all reasonable limits especially when the mortgage decree-holder was a consenting party to the action of his creditor.

Accordingly *D* is entitled to execute the attached decree.

The question, whether a creditor who has attached merely the debt applying for execution in the Court which passed the decree on the attached debt can ask for an amendment of his execution petition by asking for an attachment of the decree itself, was left open.

Appeal against the order of the District Court of North Arcot at Vellore dated 29th December, 1942, and made in A. S. No. 234 of 1942 preferred against the order of the Court of the District Munsif of Vellore dated 22nd July, 1942 and made in E. P. No. 299 of 1942 in O. S. No. 561 of 1934.

*T. V. Ramanatha Aiyar* for Appellants.

*P. C. Parthasarathi Aiyangar* for Respondents.

The appeal came on for hearing in the first instance before (Kuppuswami Ayyar, J., who made the following—

ORDER.—15th December, 1943:—This appeal by two of the defendants in O.S. No. 561 of 1934, on the file of the District Munsif's Court of Vellore arises out of a petition to execute the decree in that suit, filed by the first respondent as the attaching decree-holder. The decree-holder is one Mahommed Ibrahim Sahib, the second respondent. Mahommed Ismail Sahib the first respondent held a decree against Mahomed Ibrahim Sahib in S.C. No. 1345 of 1938, on the file of the District Munsif's Court of Vellore, and in execution of that decree he applied for attachment of the decree in O.S. No. 561 of 1934, and it is as such attaching decree-holder the petition from which the appeal arises was filed by him. Though various objections were raised, for the purposes of this appeal we have to consider only one of them, and that was that Mohamed Ismail as attaching decree-holder could not validly execute the decree, because though there was an order for attachment the attachment was not effected as required by the provisions of Order 21, rule 53, Civil Procedure Code. Both the decrees were passed no doubt by the District Munsif of Vellore. But then, one was a decree in a Small Cause Suit and the other was a decree in an Original Suit. By reason of section 33 of the Provincial Small Cause Courts Act the two decrees have to be considered to have been passed by two different Courts. Under Order 21, rule 53, Civil Procedure Code which relates to the manner in which attachment of decrees should be effected, if the decrees were passed by the same Court, then the orders of the Court directing the attachment would be enough to effect it. But if the decree sought to be attached is passed by a different Court, then the attachment is to be effected by the issue to such other Court of a notice by the Court which passed the decree sought to be executed requesting such other Court to stay the execution of the decree unless and until the Court which passed the decree sought to be executed, cancelled the notice or the holder of the decree sought to be executed or the judgment-debtor applied to the Court receiving such notice to execute its own decree. In this case it does not appear that any such notice was issued.

The learned District Munsif got over this objection by merely stating—

"The short answer to this objection is that Order 21, rule 53, Civil Procedure Code provides that an attachment of a decree of the same Court shall be made by the order of the Court;"

that nothing more was necessary and that no service on the Court which passed the decree nor on the judgment-debtor was necessary to effect or complete the attachment; and that the order of attachment must be considered to have been passed under the appropriate rule, *i.e*, Order 21, rule 53, Civil Procedure Code. But he evidently did not notice that the two decrees cannot be construed to be decrees of the same Court, and perhaps he had not in his mind the provisions of section 33 of the Provincial Small Cause Courts Act. In the petition filed for attachment of this decree, the prayer runs thus:—

"Relief prayed: By issue of a prohibitory order to the plaintiff and defendant in O.S. No. 561 of 1934, under Order 21, rule 46, Civil Procedure Code in respect of their mortgage decree obtained by the defendant herein in O.S. No. 561 of 1934, against Abdul Rahim Sahib, Ganesh Mull and Chunilal, 27—8—1935 and to attach the same and to stay the sale proclamation by the plaintiff and to issue notice under Order 21, rule 66, Civil Procedure Code and sale proclamation and to sell the same and to collect the amount including the amount of costs. It is therefore respectfully prayed. . . . . . ."

Thus it is seen that the prayer was not only for issuing a prohibitory order to the plaintiff and the defendant in O.S. No. 561 of 1934, but also to attach the decree; and the order passed was "Attach". This order was passed on 22nd July, 1940. On 16th August, 1940, as the prohibitory order was not returned, the petition was adjourned to 23rd August, 1940. On 23rd August, 1940, the attachment was made absolute. The defendant refused to receive notice and was absent; the first garnishee also refused to receive the prohibitory order and was absent, and the second garnishee was served but was absent, and the third garnishee in person stated that he was not aware of the decree. When the attaching creditor applied for execution of this decree, he was directed to file a copy of the attachment order, the execution petition and the order thereon; and they were all filed.

The present contention of the appellant was met by the learned District Judge on appeal by the following sentence;

"But as the lower Court has remarked, the question of law is for the Court, and as the Court directed the attachment it must be held to have done it under Order 21, rule 53, Civil Procedure Code the correct provision of law applicable and not under Order 21, rule 46, Civil Procedure Code."

Evidently both the Courts did not notice that the procedure prescribed under Order 21, rule 46, was followed because there was a specific prayer for sending prohibitory orders to the plaintiff and defendant in O.S. No. 561 of 1934, and it is this specific prayer of the decree-holder that necessitated the issue of the prohibitory orders. But there was also a prayer for attaching the decree apart from the prayer for issue of the prohibitory orders. The order passed was "Attach". Evidently as the small cause suit and the original suit were decreed by the same District Munsif, the office did not think it necessary to write out a specific notice and keep it in the records of the original suit. It was held by the Privy Council in *Muthia Chetti* v. *Palaniappa Chetti*,[1] that a mere order for attachment will not be enough and that the attachment must be effected in the manner prescribed by the Code before there could be a valid attachment and rights created under it. In *Thiruvengada* v. *Vythilinga*,[2] it was pointed out that a decree for money obtained by a judgment-debtor is not a debt and that if a decree-holder desired to render a decree obtained by the judgment-debtor available for the satisfaction of his decree, the procedure laid down in section 273 of the Code of Civil Procedure of 1882 (corresponding to Order 21, rule 53 of the Code of 1908) should be followed. On the strength of this authority it will have to be found that the prohibitory orders which were sent would not be enough to enable the attaching decree-holder to execute the decree attached.

I do not think the fact that a copy of the order directing the attachment was filed in these proceedings could cure the defect. This is rather a hard case. I thought that if an entry had been made in the suit register or any register connected with O.S. No. 561 of 1934, that there was an attachment of that decree at the instance of the decree-holder in S.C.S. No. 1345 of 1938, on the file of the District Munsif's Court of Vellore, it may be taken to amount to a valid communication of the attachment. So I asked for a report from the District Munsif as to whether there is any such entry in the records. He has sent a reply that there is no such entry in the registers or records of the original suit.

It is urged however for the appellant that in view of the fact that if a fresh petition is to be filed after getting a notice issued by the attaching Court, it may be barred by

1. (1928) 55 M.L.J. 122: L.R. 55 I.A. 256: I.L.R. 51 Mad. 349 (P.C.).

2. (1883) I.L.R. 6 Mad. 418.

limitation, this Court should, in its discretion allow the petition out of which this appeal arises to be amended by adding a prayer for directing an attachment of the decree sought to be executed, and for this reliance is placed on a decision of a Bench of this Court in *Alagiriswami Pillai* v. *Lakshmanan Chetty*.[1] In that case a debt was attached before the judgment. Subsequently a decree was passed in respect of that debt. Without attaching that decree the decree-holder in the suit in which the debt was attached before judgment, filed an execution petition to execute that decree obtained on the debt. Venkatasubba Rao, J., was of the opinion that the attachment of the debt would amount to a valid attachment of the decree as well. But Reilly, J., was of a different opinion. But both of them agreed to get over the hardship by permitting the appellant to amend his execution petition by asking for an attachment of the decree. With great respect to the two learned Judges I am not able to see how in a petition to execute a decree in a particular suit there could be a prayer for attachment of that very decree. Such a request can be made only in the petition to execute the other decree and not in the petition to execute the very decree which is sought to be attached. Since it is a decision of a Bench I am bound by it. But in view of the difficulty that I have expressed in following it, the papers will be placed before His Lordship the Chief Justice for orders for posting this appeal before a Bench.

In pursuance of the above Order of Reference, the appeal against appellate order came on for hearing before the Full Bench.

*T. V. Ramanatha Aiyar* for Appellants.

*P. C. Parthasarathy Aiyangar* for respondents.

The Judgment of the Court was delivered by

*The Chief Justice.*—This second appeal has been placed before a Full Bench because Kuppuswami Ayyar, J., before whom it came in the first instance, thought that it involved the reconsideration of *Alagiriswami Pillai* v. *Lakshmanan Chetty*,[1] which was decided by a Division Bench. Having been placed in possession of the facts we are of the opinion that the appeal does not call for the reconsideration of *Alagiriswami Pillai* v. *Lakshmanan Chetty*.[1]

In Original Suit No. 561 of 1934 of the District Munsif's Court, Vellore, the second respondent obtained a mortgage decree against the appellants. In Small Cause Suit No. 1345 of 1938 of the same Court the first respondent obtained a decree against the second respondent and decided to execute it by the attachment of the decree obtained by the second respondent in Original Suit No. 561 of 1934. Section 33 of the Provincial Small Cause Courts Act, 1887, states that a Court invested with the jurisdiction of a Court of Small Causes with respect to the exercise of that jurisdiction, and the same Court with respect to the exercise of its jurisdiction, in suits of a civil nature which are not cognizable by a Court of Small Causes, shall, for the purposes of the Act and the Code of Civil Procedure, be deemed to be different Courts. Therefore the District Munsif sitting to try original suit No. 561 of 1934 constituted a different Court from that which he constituted when he tried Small Cause Suit No. 1345 of 1938.

Order 21, Rule 53 (1) of the Code of Civil Procedure, states the procedure to be followed when a decree is sought to be attached in execution. Clause (*a*) of sub-rule (1) states that if the decree to be attached was passed by the same Court the attachment shall be made by an order of that Court. Clause (*b*) states that if the decree sought to be attached was passed by another Court, then the attachment shall be made by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting the other Court to stay the execution of its decree, unless and until (1) the Court which passed the decree sought to be executed cancels the notice, or (2) the holder of the decree sought to be executed or his judgment-debtor, if he has obtained the consent in writing of the decree-holder or the permission of the attaching Court, applies to the Court receiving the notice to execute that decree.

1. (1925) 50 M.L.J. 79.

The defendants in Original Suit No. 561 of 1934 say that that decree cannot be executed by the first respondent because the District Munsif sitting as a Judge of Small Causes did not issue to himself as the District Munsif exercising ordinary jurisdiction a notice in writing requesting a stay of the execution of the decree passed in Original Suit No. 561 of 1934. It is true that a notice in writing was not issued, but whether that vitiates the proceedings in execution of the decree in Original Suit No. 561 of 1934 is quite another matter.

The decree in Original Suit No. 561 of 1934 was passed on the 24th September, 1936, and the decree in Small Cause Suit No. 1345 of 1938 on the 10th July, 1939. On the 17th July, 1940, the first respondent applied to the District Munsif as the Judge of Small Causes for the attachment of the decree in Original Suit No, 561 of 1934. This application was made in execution petition No. 909 of 1940, arising out of Small Cause Suit No. 1345 of 1938. On the 8th August, 1940, on this petition, the District Munsif issued an order on the plaintiff in Original Suit No. 561 of 1934 prohibiting him from receiving the decree debt until further orders of the Court and an order on the defendants prohibiting them from paying the debt. On the 16th August, 1940, the District Munsif in execution petition No. 909 of 1940 ordered the decree in Original Suit No. 561 of 1934 to be attached and on the 28th August, after the parties in Original Suit No. 561 of 1934 had been served with the prohibitory orders, he made the attachment absolute. On the 7th January, 1942, the first respondent applied in Execution Petition No. 299 of 1942 to the District Munsif as exercising ordinary civil jurisdiction for leave to proceed to execute the decree in Original Suit No. 561 of 1934. On the 12th February, 1942, the petition was returned to him by the District Munsif with the direction that he should file particulars of the attachment. On the 23rd February the first respondent returned the petition with an affidavit giving the necessary particulars. The petition was again returned to him, because he had not filed a certified copy of the order of attachment. This was supplied on the 9th March, 1942, and the petition for execution was taken on the file and numbered as 299 of 1942. On the 22nd July, 1942, the District Munsif passed an order permitting the first respondent to execute the second respondent's decree. The defendants objected but their objections were overruled. The District Judge on first appeal agreed with the District Munsif and this appeal is from the order of the District Judge.

It has to be borne in mind that the objection comes from the defendants in Original Suit No. 561 of 1934 and not from the plaintiff. Their learned counsel has stressed the judgment of the Privy Council in *Muthiah Chetti* v. *Palaniappa Chetti*,[1] where it was held that a mere order for attachment is not enough to create a valid attachment. Before there can be a valid attachment and rights created under it the attachment must have been effected. He has also drawn our attention to *Thiruvengada* v. *Vythilinga*[2] and *Anil Kumar* v. *Jugal Kishore*.[3] In the former of these cases a Bench of this Court held that a decree for money is not a debt which can be attached and sold and that the procedure laid down by the Code must be followed where a decree-holder desires to render a decree obtained by his judgment-debtor available for the satisfaction of his own decree. In *Anil Kumar* v. *Jugal Kishore*,[3] the Calcutta High Court held that there can be no valid attachment of a decree without a notice under Order, 21, Rule 53 (1) (*b*). But the facts in that case were very different from the facts in this case. The Courts were separate, not only in a technical sense, but actually and the objection came from the holder of the attached decree. He very rightly said that a creditor who had obtained judgment against him could not proceed to execute his decree

1. (1928) 55 M.L.J. 122: L.R. 55 I.A. 256: I.L.R. 51 Mad. 349 (P.C.).
2. (1883) I.L.R. 6 Mad. 418.
3. (1938) 43 C.W.N. 374.

until he had taken the steps required by the Code. The object of Order 21, rule 53 (1) (*b*), is to prevent the holder of a decree executing it to the detriment of the person who has obtained a decree against him. The notice contemplated by Order XXI, rule 53 (1) (*b*) merely prevents the execution being proceeded with until the notice contemplated by this clause is cancelled or the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving the notice to execute the attached decree.

In this case the District Munsif was fully aware of what had transpired in both the suits. Sitting as the Judge of Small Causes he ordered the decree in Original Suit No. 561 of 1934 to be attached and gave notice to the parties in that suit of that fact. Then sitting as the District Munsif exercising ordinary civil jurisdiction he accepted the petition for execution by the first respondent in Original Suit No. 561 of 1934, after the order of attachment had been filed in those proceedings. The position was that the first respondent applied to the proper Court for an order of attachment of the decree and he applied to the proper Court to be allowed to execute the attached decree. Supposing the District Munsif as the Judge of Small Causes had served upon himself as District Munsif having jurisdiction in Original Suit No. 561 of 1934, a written notice under rule 53 (1) (*b*) the notice would have expired as soon as the first respondent applied in that suit to be allowed to proceed in execution. To say that there was no valid attachment because there was no written notice issued by the District Munsif as the Judge of Small Causes to himself as the District Munsif having jurisdiction in Original Suit No. 561 of 1934, would be pushing technicality beyond all reasonable limits especially when the holder of the decree in Original Suit No. 561 of 1934, was a consenting party to the action of his creditor. We consider that the matter was rightly decided below and the appeal must be dismissed with costs.

We may add that the reason why Kuppuswami Ayyar, J., thought that *Alagiriswami Pillai* v. *Lakshmanan Chetty*,[1] had to be reconsidered was because the first respondent had asked to be allowed to add to his petition for execution a prayer directing the attachment of the decree sought to be executed, and in support of this application he relied on *Alagiriswami Pillai* v. *Lakshmanan Chetty*.[1] As in our opinion an amendment is not necessary to do justice between the parties it is not necessary to consider whether the decision in *Alagiriswami Pillai* v. *Lakshmanan Chetty*,[1] was rightly decided.

K. S. — *Appeal dismissed.*

## IN THE HIGH COUFT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

The Municipal Council, Kumbakonam, represented by its Commissioner. *Petitioner**

*v.*

The Kumbakonam Bank, Ltd., Kumbakonam, by its Managing Director S. Mahalinga Aiyar .. *Respondent*

*Madras District Municipalities Act (V of 1920), schedule IV, rule 4 (1) and rule 19 (1)—Bank—Enhancement of assessment to the profession tax because of non-inclusion of income from investments—Payment under protest—Suit for recovery of amount—Re-assessment beyond the powers of the municipal council.*

A notice was issued to a bank under rule 4 (1) of Schedule IV of the District Municipalities Act calling upon it to show cause against a proposed increase in the assessment to profession tax, because the income from the property and investments had not been included in the assessment. After the assessment had been enhanced and the additional tax had been paid under protest, a suit was brought in order to recover the amount involved.

*Held*, that although the income of the bank from investments is found to be liable to assessment to profession tax, no interference in revision in favour of the municipality will be made in view of the fact that the bank would on other substantial grounds be entitled to relief. It is an elementary

1. (1925) 50 M.L.J. 79.

* C. R. P. No. 683 of 1943. 16th February, 1944.

proposition of law that all taxing statutes should be strictly construed and there is no difficulty in finding on the unambiguous wording of rule 4 (1) of schedule IV of the District Municipalities Act, that the power of revision of assessment books does not extend to a company. Hence the proceedings of the Municipal Council in amending the assessment books and enhancing the tax were beyond the powers of the Council and the bank was entitled to recover on that ground.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Kumbakonam, dated 14th December, 1942 and passed in S. C. S. No. 201 of 1942.

*K. Kuttikrishna Menon* for Petitioner.

*C. A. Seshagiri Sastri* for Respondent.

The Court delivered the following

JUDGMENT.—The question raised in this petition under section 25 of the Provincial Small Cause Courts Act is whether that part of the income of a banking company which has been derived from investments can be assessed to profession tax by a municipality under section 93 and the relevant rules in schedule IV of the District Municipalities Act.

The facts in so far as they are necessary are that the Kumbakonam Bank, Ltd., was assessed to and paid profession tax for the two half-years of 1940-41 at the rate of Rs. 68-12-0 half-yearly. Some months later a notice was issued under rule 4 (1) of schedule IV of the Act calling upon the bank to show cause against a proposed increase in the assessment because the income from property and investments had not been included in the assessment. The objections were overruled and after the assessment had been enhanced, the additional tax levied was paid under protest. The suit was then launched in order to recover the amount involved. Several pleas were raised but the only question which now arises for decision is whether this income from investments is subject to assessment.

On this question there is very little room for doubt. The assessment is made on the basis of a return called for under rule 19 (1) of schedule IV, according to which the return must exhibit the income on the basis of which, according to the company, it is liable to be assessed to profession tax for the half-year in question. The learned Government Pleader contends that although this rule does not prescribe the various kinds of income which must be exhibited in its return, it necessarily follows from a consideration of section 277-F of the Indian Companies Act and the explanation to rule 19 of schedule IV of the District Municipalities Act that the income exhibited must be the total income from all the company's activities as such. Section 277-F of the Indian Companies Act defines a banking company in these words :

"A 'banking company' means a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order notwithstanding that it engages in addition in any one or more of the following forms of business, namely :— . . . . the acquiring, holding, . . . of stock, funds, shares, debentures, debenture stocks, bonds, obligations, securities and investments of all kinds ; . . .

(17) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company."

Under these two sub-clauses the investment of the bank's moneys in securities is within its powers as a banking company and there is no room for the contention that the interest received on these investments made within its powers is not part of its income as a banking company.

As an alternative to submitting of return under rule 19 (1) of schedule IV of the District Municipalities Act, the company may submit under the explanation to clause (2) of rule 19 the notice of demand of income-tax served upon it ; if this be done, the executive authority shall be bound to take one-half of the income mentioned in the demand as the income derived from the sources on which profession tax is leviable under the Act for the half-year in question. Under the Income-tax Act the income from the company's investments would be chargeable, so that

this income would be included in the assessment by the executive authority for purposes of profession tax. Apart from this, the learned Government Pleader rightly points out that there is in principle no difference between income which is derived from loans made by a banking company to its constitutents, and the interest on loans made to Government in the form of Government promissory notes, etc. The view taken by the learned Munsiff is incorrect and I find that the income from investments is liable to profession tax.

On this finding the suit should be dismissed but the procedure of the municipal council in re-assessing the plaintiff-company appears to have been beyond its powers. As already explained, the council issued a notice under rule 4 (1), schedule IV of the District Municipalities Act. Rule 4 (1) is in these words.

> "If at any time it appears to the council that any person or property had been inadequately assessed or inadvertently or improperly omitted from the assessment books relating to any tax, or that there is any clerical or arithmetical error in the said books, it may direct the executive authority to amend the said books in such manner as it deems just or necessary."

In this rule there is no reference to a company and in view of the fact that rules 16, 17, 18 and 19 specifically mention companies and persons, the omission must mean that the power to revise the assessment books can be exercised only in respect of persons or property. The learned Government Pleader contends that the word "property" in this rule must be deemed to include income which has hitherto escaped assessment; but as rules 1 to 5 of the schedule are common to taxes in general, including the property tax, it necessarily follows that the word "property" in rule 4 (1) refers only to immoveable property as contemplated by section 81 of the Act. It is an elementary proposition of law that all taxing statutes must be strictly construed and there is no difficulty in finding on the unambiguous wording of this rule that the power of revision does not extend to a company. Therefore, the proceedings of the municipal council in amending the assessment books and enhancing the tax were beyond their powers and the plaintiff bank was entitled to recover although on a different ground from that on which it has succeeded.

Another aspect of the matter which has not hitherto received notice is the irregular way in which this amended assessment was made. The whole of the record has not been printed, but from the papers available it appears that on receiving the auditor's objection to the assessment the matter was placed before the municipal tax appellate committee for the revision of the tax. This procedure is not contemplated by the rules in schedule IV. Under rules 19 (2), (3) and (4) the powers of assessment are in each case to be exercised by the executive authority and the powers of amendment of the assessment books under rule 4 (1) are also vested in the executive authority. The power to revise the assessment consequent upon the amendment of the assessment books under rule 4 (1) is to be found in the proviso to rule 28 of the schedule and it is in these words:

> "Provided that where any assessment or demand is not in accordance with the assessment books nothing in this rule shall be deemed to prohibit a fresh assessment or demand of the tax being made in accordance therewith."

It necessarily follows that if a fresh assessment or demand is to be made, it must be made in accordance with the rules, that is to say, by the executive authority in accordance with the procedure laid down in rules 16 to 19 of the schedule. When an assessment has been made by the executive authority, it is subject to appeal to the municipal council and these appellate powers are exercised by an appeal committee. Therefore, when the assessment was revised by the appellate committee instead of by the executive authority in accordance with the statutory rules, the plaintiff bank was to all intents and purposes deprived of its statutory right to appeal, apart from the fact that the assessment was made by a body which did not possess the necessary powers.

The result must be that although the income from investments is found to be liable to assessment to profession tax, no interference in revision will be made in view of the fact that the plaintiff bank would on other substantial grounds be entitled

to relief. The petition is ordered to be dismissed but, in view of the circumstances and the fact that these grounds were not taken in the lower Court, with no orders as to costs.

K.C. —— *Petition dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Vasireddi Venkatappiah and others .. *Appellants**

*v.*

Vasireddi Seetharamavarma and another .. *Respondents.*

*Limitation Act (IX of 1908), Article 182 (5)—Order—Date of—Not writing and signing but delivery fixes date of order.*

The writing and signing of a judgment does not make it effective until it is actually pronounced in open Court on a date of which notice has been given to the parties. So that whatever might be the date on which a judge may write and sign his judgment, the date of judgment is the date on which it is delivered in Court.

On an execution petition notice was ordered on December 2, 1936, to the judgment-debtor to 29th January, 1937, and the decree-holder was ordered to pay batta. On his failure to do so till 15th January, 1937, the Munsiff wrote : " No batta paid. Dismissed." On the question whether limitation would start on that date or from the date to which alone notice had been ordered,

*Held*, that there being no reason to think that the order of the 15th January, 1937, was made known to the parties before 29th January, 1937, and the latter date being the only day on which under the rules the Munsiff could dismiss the application it was only on that date that the order must be deemed to have been made.

Appeal against the order of the District Court of Guntur dated 26th October, 1942, in A. S. No. 348 of 1941 (E. P. No. 45 of 1940 in O. S. No. 1431 of 1927, District Munsiff's Court, Guntur).

*M. S. Ramachandra Rao* and *D. R. Krishna Rao* for Appellants.

*V. Rangachari* for Respondents.

The Court delivered the following

JUDGMENT.—E. P. No. 145 of 1940 out of which this appeal arises, was filed on 25th January, 1940 ; and it was in time only if the final order on the prior E. P. No. 984 of 1936, was passed within three years of that date. On 2nd December, 1936, notice was ordered to the judgment-debtor to 29th January, 1937 ; and the decree-holder was ordered to pay batta. Under the rules he had to do so within two days. This he did not do ; and as he had failed to pay batta even by 15th January, 1937, the District Munsiff wrote "No batta paid. Dismissed." If 15th January, 1937, is the date of the final order, then the present E. P. is out of time. If, however, that order is deemed to be one of 29th January, 1937, the date on which the order dismissing the petition should have been passed, then the present E. P. is within time. Both the lower Courts held that the final order in E. P. No. 984 of 1936 must be deemed to have been passed on 29th January, 1937. They accordingly ordered execution to proceed.

A preliminary objection has been taken to the maintainability of this appeal, on the ground that since the filing of this appeal, the judgment-debtors have filed an application under the Madras Agriculturists' Relief Act to have the decree debts scaled down, and it is argued that they are thereby estopped from questioning the correctness of the order of the lower Courts. It would seem from a decision of Wadsworth and Patanjali Sastri, JJ., in *Subba Rao* v. *Seshayya*[1] and from one of Patanjali Sastri, J., in *Satyanarayanamurthi* v. *Srinivasa Jagannadha Rao*[2], that a Court cannot inquire into an application filed by the judgment-debtor to have his decree scaled down if the judgment-debtor contends that the debt is barred by limitation ; because there would then be no debt to scale down. Although these authorities

* A. A. A. O. No. 59 of 1943. 11th January, 1944.

1. (1942) 2 M.L.J. 551. 2. (1943) 2 M.L.J. 135.

might have been cited in the Court which passed the decree as affording a reason why the Court should not proceed with the application to scale down the debt, yet it does not follow that this Court cannot proceed to determine whether or not the suit was barred by limitation and, if it finds that the application was barred by time, to dismiss the execution petition. As a finding was given against the judgment-debtors, they had a statutory right of appeal; and it seems to me that no conduct of theirs in collateral proceedings can prevent them from filing an appeal or from prosecuting it after the appeal has been filed.

Mr. Rangachari relies on a decision of Jackson, J., in *Ramaswami Chettiar* v. *Chidambaram Chettiar*[1], but that decision and those which the learned Judge discusses in his judgment, deal with cases in which a Court permits something to be done by a party upon the payment of costs to the other side. It was held in those cases that it is not open to a party accepting the costs to question the order of which the awarding of the costs is a part. As far as I am aware, this principle has been applied only to the acceptance of costs. I am not prepared to extend its application and thereby deprive the debtor either of his right to have his debt scaled down or of his right to appeal. I am not even prepared to say that his application under the Agriculturists' Relief Act was barred, because it was found by both the lower Courts that there was a debt to be scaled down, and that finding bound the debtor unless and until it was set aside in second appeal.

On the merits of the contention that the application is barred by limitation, it seems to me that the case is somewhat analogous to that where a Judge fixes a date for pronouncing judgment; but actually writes and signs his judgment on some earlier date. The writing and signing of a judgment does not make it effective until it is actually pronounced in open Court on a date of which notice has been given to the parties. So that whatever might be the date on which a Judge may write and sign his judgment, the date of the judgment is the date on which it is delivered in Court. It was quite open to the Judge in the case we are now considering to have decided to dismiss the application because batta had not been paid; but as he had posted the case to 29th January, 1937, and as that was the only day on which under the rules the Judge could dismiss the application, it was only on that date that the order must be deemed to have been made. It is unnecessary to consider what the position might have been if, in fact, the order of 15th January, 1937, had been pronounced on that day in open Court, or had been communicated to the parties. There is no reason to think that the order of 15th January, 1937, was made known to them before 29th January, 1937. Other High Courts have taken the view that it is the date on which the order is made known to the parties that is the date of the judgment or order; but the point seems not to have arisen in this Court.

The finding of the lower Courts was correct. The appeal is therefore dismissed with costs.

K.C. —— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Singara Babu *alias* Babu .. *Petitioner**

*Penal Code (XLV of 1860), section 448—Customer suspecting trader of having false measures—Entry into shop to see whether the trader had correct measures—Does not amount to criminal trespass.*

If a person suspects that a trader, of whom he is a customer, is having false measures, he is entitled to get in and see whether the trader has correct measures or not and if he entered the shop to seize the measures his entry will not amount to criminal trespass; for, it cannot be said that when he entered the shop he did so with intent to commit any offence.

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1. (1927) 26 L.W. 527.

* Crl. R. C. No. 502 of 1943. (Crl. M. P. No. 455 of 1943). 9th September, 1943.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate of Chingleput in C. C. No. 134 of 1942.

*T. E. Ramabhadrachariar* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been convicted for an offence punishable under section 448, Indian Penal Code and sentenced to pay a fine of Rs. 30. The evidence disclosed that he entered into the shop of P. W. 1 for the purpose of seizing the measures of the trader P. W. 1 because he suspected that he was having false measures. It cannot therefore be said that when he entered the shop he entered there with intent to commit any offence. If a person suspects that a trader, of whom he is a customer, is having false measures he is entitled to get in and see whether he has correct measures or not and that is all that the petitioner is said to have done. It would not therefore amount to criminal trespass.

The conviction and sentence are set aside and the petitioner is acquitted. The fine if already collected will be refunded.

K.S. —————— *Petition allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

The Madura etc. Devasthanams, through its Executive Officer, R. S. Nayudu .. *Appellant**

*v.*

Solai Alagu Kudumban and others .. *Respondents.*

*Second Appeal—Maintainability—Suits by holder of an inam village against minor inamdars for damages for their unauthorised use of his water, for cess paid by him, for poruppu, and for interest on the sums due—Suits not being for 'rent' but of a small cause nature, second appeals do not lie—Madras Local Boards Act, section 88, first proviso.*

The landholder of an inam village brought a suit against some minor inamdars for damages for their unauthorised use of his water, for cess paid by him under the Madras Estates Land Act to Government on their lands, for poruppu, and for interest on the above sums due. In second appeals, on a preliminary objection as to their maintainability,

*Held*, that the suits were of a small cause nature and hence no second appeals lay.

The defendants not being tenants of the plaintiff, what has to be paid by them for their unauthorized use of the plaintiff's water could not be 'rent.' Nor could it be 'rent' under the Madras Estates Land Act because the defendants were not 'ryots' of the landholder.

As it was conceded that the defendants, minor inamdars, were not intermediate landholders within the meaning of the first proviso to section 88 of the Madras Local Boards Act, it followed that the landholder was not bound to pay to Government, the cess due by the defendants and that the cess cannot therefore be regarded as 'rent.'

Poruppu is not 'rent' and hence a claim for poruppu is of a small cause nature.

As the principal claims were of a small cause nature, it followed that interest on the sums due on those claims were also of a small cause nature.

Appeal against the decree of the District Court of Madura in A. S. No. 266 etc. of 1941, respectively preferred against the decree of the Court of the District Munsiff of Madura taluk in O S. No. 201 of 1939, etc.

*K. Rajah Aiyar* and *T. A. Ramaswami Reddi* for Appellant in S. A. Nos. 46 to 49 and 73 and 74 of 1943 and *A. Balasubramania Aiyar* for Second Respondent in S. A. No. 46, *V. Meenakshisundaram*, for Respondents in S.A. No. 48 and *K. V. Sreenivasa Aiyar*, for Respondents in S. A. No. 49.

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*S. As. Nos. 46 to 49 and 73 and 74 of 1943. 17th February, 1944.

The Court delivered the following

JUDGMENT.—A preliminary objection has been raised to the maintainability of these second appeals; and the question, the answer to which determines whether second appeals lie or not, is whether the suits are of a small cause nature.

The appellant is the landholder of the inam village of Moolakurichi, whereas the respondents are minor inamdars. Under their grant, they are entitled to water for a single crop; but they have been taking water from the appellant's tank for a second crop. The appellant brought the suits for damages for the use of his water, for *poruppu*, for cess paid under the Madras Estates Land Act to Government on the land of the respondents, and for interest on the various amounts due under the other heads.

The respondents are not the tenants of the appellant; and so what is paid for the taking of water to which they are not entitled cannot be rent. The plaintiff can claim only damages for the unauthorised use of his water. The learned advocate for the appellant relies on the decision in *M. K. Devasthanam* v. *Subbiah Ambalam*[1], which followed *Venkataraju* v. *Maharajah of Pittapur*[2], in which it was held that a claim for water was rent; but the learned Judges based their decision on the peculiar definition of rent in section 3 (11) of the Madras Estates Land Act where "rent" bears not only the ordinary meaning but also includes "whatever is lawfully payable . . . *to a landholder by a ryot* . . . . on account of water . . . . . . taken without his permission . . . ." This definition of rent is seen to apply only to what is lawfully due by a ryot to his landholder. It cannot therefore apply to what is due by one who is not a ryot of the landholder.

The cess that the appellant claims is not only on the water taken unauthorisedly but also on the assessable value of the whole of the land in the possession of the minor inamdars. The cess on land held by an intermediate landholder has to be paid, under the Madras Local Boards Act, by the landholder and can be recovered by him from those for whom he pays. In such a case, it can be recovered from the intermediate landholder as rent. If, in fact, the respondents are intermediate landholders, then there can be no doubt that this suit may be regarded in part as a suit for rent, in which case there would be reason for thinking that the suit with regard to that particular part of the claim is not of a small cause nature. But the question whether the respondents are intermediate landholders or not is a question of fact. The first proviso to section 88 of the Madras Local Boards Act seems to define an intermediate landholder as one who holds the land on an under-tenure created, continued or recognised by a landholder. Where the minor inam is an under-tenure of this kind, decisions of this Court have held that the minor inamdar is an intermediate landholder; but obviously the contention of the learned advocate for the appellant that all minor inamdars are intermediate landholders cannot be correct. Supposing, for example, a minor inam had been granted even before the village, then the older inam could not be held as an under-tenure of something which was created afterwards. The minor inamdar would then hold his land directly under the grantor (in this case the Government). This distinction is recognised in *Rajah of Vizianagaram* v. *Thammanna*[3], where the learned Judges say:

> "The scheme of the Local Boards Act is that when the inam lands have not been included in the assets of the Zamindari, the inamdar is himself a landholder holding directly under the Government. But if the assets include the inam lands as well, he has no direct relation with the Government, but the Government collects the cess from the landholder and the landholder reimburses himself from the inamdar treating him as an intermediate landholder."

I have been asked to call for a finding from the lower Courts, whether, as a fact, the respondents are intermediate landholders or not; but I cannot do so in view of the admissions made by the appellant in the lower appellate Court. The learned Judge says:

1. (1940) 1 M.L.J. 160 : I.L.R. (1940) Mad. 381 (F.B.).
2. (1938) 1 M.L.J. 256 : I.L.R. (1938) Mad. 498 (F.B.).
3. (1937) 1 M.L.J. 91 I.L.R. (1937) Mad, 745.

"The first proviso to section 88 does not apply, because it is conceded that the defendants are not intermediate landholders . . . . The land is held by the defendant on a tenure quite independent of the plaintiff. (That is not disputed) . .. ."

If, as was conceded in the lower appellate Court, the respondents are not intermediate landholders, it would follow that the zamindar is not bound to pay to Government the cess due by the respondents. They must pay it themselves. The cess cannot therefore be regarded as rent.

That *poruppu* is not rent was held by Mr. Justice Curgenven in *Ramaswami Chettiar* v. *Doraisingara*[1]; so that a claim for *poruppu* is of a small cause nature. The learned Judge compared *poruppu* to jodi and followed *Venkatagiri Raja* v. *Venkatarau*[2], a decision of a Bench of this Court. He also pointed out that in *Mosafkani Rowther* v. *Doraiswami*[3] and in *Seetharama Iyer* v. *Fischer*[4], it had been conceded as a matter beyond argument that a claim for *poruppu* was one of a small cause nature.

If the principal claims are of a small cause nature, it follows that interest on the sums due on those claims will also be of a small cause nature.

As the suits relate to very small sums of money, no second appeal lies. All the six appeals are dismissed. The respondents will receive their costs from the appellant in S. A. Nos. 46, 48 and 49 ; but in S. A. Nos. 46 and 48 of 1943 there will be only one advocate's fee (one half in each).

V.S. *Second Appeals dismissed.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

N. S. Subramania Ayyar .. *Petitioner.**

*Criminal Procedure Code (V of 1898)—Magistrate ordering* de novo *trial—Remand of case by High Court for re-hearing—Loss of records owing to fire—Circumstances justifying* de novo *trial.*

Where a Joint Magistrate was not able to re-hear an appeal remanded in revision for re-hearing owing to the loss of records by fire, and he ordered a *de novo* trial of the same,

*Held*, that in a criminal case, it is not certainly safe to dispose of the matter without having all the necessary materials before the Magistrate. In the circumstances a *de novo* trial was the best course to adopt.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Joint Magistrate of Devakottai in C. A. No. 71 of 1944 (C. C. No. 978 of 1941 on the file of the Court of the Sub-Magistrate of Tiruvadanai).

*S. Venkatesa Aiyangar* for Petitioner.

The Court made the following

ORDER.—This is a petition by the complainant in C. C. No. 978 of 1941 on the file of the Sub-Magistrate of Tiruvadanai. Two accused were charged in that case with having committed criminal breach of trust in respect of some jewels. They were convicted by the first Court. On appeal the Joint Magistrate of Devakottai acquitted them. The matter was taken in revision to this Court and the order of the appellate Magistrate was reversed and he was asked to re-hear the appeal. The Joint Magistrate was not able to re-hear the appeal because the records in the case had been burnt when his Court was set fire to in August 1942 with the result that he found himself unable to go on with the appeal in the absence of the necessary papers. Certified copies of the prosecution evidence were available but that of the defence evidence was not available. The Magistrate had therefore no other course but to direct a *de novo* trial after having set aside the conviction. It is stated that the Magistrate was wrong in ordering a *de novo* trial as this Court has not directed such

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1. (1932) 35 L.W. 144.
2. (1897) 8 M.L.J. 83: I.L.R. 21 Mad. 243.
3. (1926) 54 M.L.J. 30.
4. (1907) 17 M.L.J. 487.

* Cr. R.C. No. 210 of 1944.
(Cr. R. P. No. 201 of 1944).

1st March, 1944.

a course in the order of the revision petition. But then it does not appear that this Court was appraised of the fact that the necessary records which the appellate Magistrate will have to look into were not available. If certified copies had been available, certainly the Appellate Magistrate would not be justified in setting aside the conviction and ordering a *de novo* trial. It is stated that the summary of the evidence as given in the judgment as also in the notes which were prepared by the counsel for the complainant could be looked into and the records re-constructed. But then such notes cannot be taken as containing everything that was stated by the witnesses.

In a criminal case, it is certainly not safe to dispose of a case without having all the necessary materials. In these circumstances the only course open to the Magistrate was to have ordered a *de novo* trial and I therefore see no reason to interfere with the order directing a *de novo* trial. The petition is accordingly dismissed.

K.C. ——— *Petition dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Pidugu Narasimham .. *Appellant**

*v.*

Batchu Latchayya .. *Respondent.*

*Civil Procedure Code (V of 1908), section 47 and Order 21, rule 66—Mortgagee objecting to the order in which sale of items of property should take place—Discretionary order—Administrative convenience—Appealability of—Interference in revision.*

Upon notice to settle the terms of a proclamation in execution of a mortgage decree against two items of property, the third defendant in the case appeared and asked the Court to order his property to be sold after the other property. The mortgagee objected but the Court decided that it was in the interests of justice and equity to sell the third defendant's property after the other property had been sold and drew up the proclamation accordingly. On appeal against the order the question of appealability of such an order was raised.

*Held*, that even though the decree was a mortgage decree, the Court had a discretion in fixing the order of sale and the order doing so is an administrative order not liable to appeal.

*Narasimha Rao* v. *Subbarayudu*, (1926) 51 M.L.J. 135, followed.

Appeal against the order of the Court of the Subordinate Judge of Guntur, dated 2nd April, 1943 and made in A. S. No. 50 of 1943 (E. P. No. 535 of 1942 in O. S. No. 48 of 1941, District Munsiff's Court, Gurzala).

*V. Rangachari* for Appellant.

*Ch. Raghava Rao* and *G. C. Venkatasubba Rao* for Respondent.

The Court delivered the following

JUDGMENT.—In execution of a mortgage decree against two items of property, upon receipt of a notice to settle the terms of proclamation, the third defendant appeared and asked the Court to order his property to be sold after the other property. The mortgagee objected ; but the District Munsiff decided that it was in the interests of justice and equity to sell the third defendant's land after the other property had been sold ; and so drew up the proclamation accordingly. An appeal was preferred by the mortgagee to the Subordinate Judge, who said that as the question of priority had been expressly raised in the suit itself, " the executing Court has no such power to veto the effect of the decree." He therefore set aside the order of the District Munsiff as one being made without jurisdiction and allowed the appeal.

The appellant contends that the first appeal was incompetent as the order passed by the District Munsiff was not an appealable order. The learned advocate for the respondent therefore contends as a preliminary objection that if that is so, then by the appellant's own showing no second appeal could lie. That view was no doubt expressed by way of *obiter dictum* by Sadasiva Ayyar, J., in *Rukmani Ammal*

* A. A. A. O. No. 149 of 1943. 20th January, 1944.

v. *Narasimha Iyer*[1]; but it has now been well settled that a second appeal does lie. Jackson and Butler, JJ., in *Raman Nambiar* v. *Rayiram Naman*[2], held that the appealability of an order was governed not by what the lower Court should have done but by what the lower Court purported to do. That decision has been followed consistently. Wadsworth, J., expressly followed it in *Kallalagar Devasthanam* v. *Bhaskaram Pillai*[3]; and the same learned Judge with Patanjali Sastri, J., in *Sitaramamurthi* v. *Lakshminarayanamurthi*[4] accepted that principle as being well settled. There is therefore no point in this objection of the respondent.

The question whether the order of the District Munsiff was appealable or not depends upon the answer to the question whether the order of the District Munsiff was one settling the rights of parties, in which case it would come within the scope of section 47, Civil Procedure Code, or whether it was a mere administrative order passed under Order 21, rule 66, deciding as a matter of discretion which property should be sold first. The decisions referred to by the learned advocate for the mortgagee, namely, *Mangayya* v. *Sriramulu*[5], *Vedavyasa Iyer* v. *Madura Hindu Labha Nidhi, Ltd.*[6] and *Subba Iyer* v. *Pichumani Iyer*[7], are cases in which some question of priority arose in execution; and the executing Court, in determining which property should be sold first, adjudicated on the rights of the parties. It was held in *Lanka Rama Naidu* v. *Lanka Ramakrishna Naidu*[8], that unless rights of parties were decided, the fixing of the order of selling was an act of administration by the executing Court and therefore not appealable, the learned Judge following the Full Bench decision in *Sivagami Achi* v. *Subramania Iyer*[9]. The fixing of the order of sale in execution of a mortgage decree may however be somewhat different from a case where the execution was of some other kind of decree, a money decree for example; for as was observed in *Thanmul Sowcar* v. *Ramadoss Reddiar*[10] "one of the rights of the mortgagee undoubtedly is to choose against which of several properties mortgaged to him he may proceed." In *Arunachalam Chetty* v. *Murugappa Chetti*[11], the learned Judges went so far as to say, "the mortgagee is ordinarily entitled to realise the debt due to him by proceeding against the whole or any of the parcels of land mortgaged to him." He is even entitled, they hold, to ask the Court before the decree is passed to order a certain item of property to be sold first. Mr. Vallabhachari contends that although that may be so, if the mortgagee does not exercise his option and merely asks the hypotheca to be brought to sale, it is open to the Court to fix a certain order of sale even against the wishes of the mortgagee. I should be reluctant to agree that the right of a mortgagee to sell his property in whichever order he may choose or to give up an item of property can be lost at any stage; but one of the cases in which it was said that the fixing of the order of sale was a mere administrative order not liable to appeal, namely, *Narasimha Rao* v. *Subbarayudu*[12], dealt with a mortgage decree. I am bound by this decision of a Division Bench of this Court and must therefore hold that even though the decree was a mortgage decree, the Court had a discretion in fixing the order of sale and that the order doing so was an administrative order not liable to appeal.

The ground on which the lower appellate Court interfered in appeal was that as the judgment-debtor had raised the point in the suit and it had been held that he had no such right either in law or in equity to have his item of property sold last, the executing Court had no jurisdiction to pass an order in his favour. There can be no doubt that if a decree fixes the order of sale, it is not open to the executing Court to vary it. If it does so, then it passes an order affecting the right of a party, which order would be appealable. But I do not find that such is the case here. The Court which passed the decree did nothing more than to negative the third defendant's claim that he had a right to have his property sold last; there is nothing

1. (1921) 41 M.L.J. 54.
2. (1934) 67 M.L.J. 43: I.L.R. 57 Mad. 777.
3. (1942) 2 M.L.J. 450.
4. (1942) 2 M.L.J. 568.
5. (1913) 24 M.L.J. 477.
6. (1923) 45 M.L.J. 478.
7. A.I.R. 1926 Mad. 1144.
8. (1923) 46 M.L.J. 192.
9. (1903) 14 M.L.J. 57: I.L.R. 27 Mad. 259 (F.B.).
10. (1927) 55 M.L.J. 358: I.L.R. 51 Mad. 648.
11. (1916) 4 L.W. 327.
12. (1926) 51 M.L.J. 135.

in paragraph 14 of the trial Court's judgment which would in any way fetter the executing Court's discretion. I think the learned District Munsiff has put that point very well in his short order. He has said :

" The question of the order of sale was gone into in the suit and it was held that third defendant has no right to insist upon the sale of his property being held only in last instance. While third defendant has no such right, it does not necessarily follow that such an order of sale could not be made in execution proceedings, if it is just and convenient to do so and does not cause any inconvenience or loss to the decree-holder."

When a similar objection was raised in *Narasimha Rao* v. *Subbarayudu*[1], the learned Judges said :

" It is argued that because the relief which the fourth defendant has now obtained was asked for in the suit itself and not granted, it was not open to the lower Courts to grant him the relief in execution. The point has been expressly decided in *Raghavachariar* v. *Krishna Reddi*[2] and we see no reason for not accepting that authority."

The judgment-debtor did not question the jurisdiction of the Subordinate Judge in the lower appellate Court, but although I do not consider that that precludes him from raising the point here, it will follow from what has been said above that the lower appellate Court had no jurisdiction to set aside the order of the District Munsiff.

The question still however remains whether this Court in its revisional jurisdiction should allow the original order of the District Munsiff to stand or not. Although I feel that the executing Court should be most reluctant to pass any order restricting the discretion of the mortgagee to sell the property in any order in which he pleased, yet I cannot interfere in revision unless I am satisfied that the Court acted without jurisdiction. Unfortunately, the learned Munsiff did not give any reasons for his order ; but on the few facts that appear on the record, I find it impossible to say that the order of the District Munsiff was one without jurisdiction. The learned Judges in *Narasimha Rao* v. *Subbarayudu*[1] above referred to, upon finding that the order had been passed in the exercise of the Court's discretion, refused to interfere.

The appeal is allowed, the order of the lower appellate Court set aside, and the order of the District Munsiff restored. There will be no order as to costs ; for the appellant did not raise the objection in the lower appellate Court as he should have done. If he had, the first appeal might have been dismissed *in limine*.

K.C. ——— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Sama Venkataratnam .. *Appellant**

*v.*

Yenduri Venkataratnam (died) and others .. *Respondents.*

*Partnership Act (IX of 1932), section 29—Lease in favour of three partners from Government in respect of lands with salt-pans—Clause prohibiting alienation or taking in of new partners without consent of lessor—Arrangement between one of the partners and a stranger advancing money to him that latter was to receive a share of profits of that partner—Not opposed to public policy—Right of stranger to sue for accounts—Madras Salt Act (IV of 1889)—If a bar.*

*X*, *Y* and *Z* obtained a lease from the Government in respect of certain lands with all the salt-pans and brine-pans in them. There was a provision *inter alia* that the lessees shall not, except with the written consent of the lessor, assign, sublet or part with possession of the leased lands or any portion thereof and shall not transfer by sale or otherwise the powers granted to them. There was also a proviso that nothing contained therein shall prevent the lessees at any time from taking any partner or partners into the business carried on by them under the lease who may be approved by the Commissioner. *X*, *Y* and *Z* were each entitled under their partnership arrangement to a one-third share of the profits. *X* entered into an arrangement with *A* who had advanced money to him, by which, *A* was to receive a share of the profits of *X*. In a suit by *A* for settlement of accounts and recovery of his share of profits,

1. (1926) 51 M.L.J. 135.
2. (1923) 46 M.L.J. 32.

* A. A. O. No. 150 of 1942. 7th December, 1943.

*Held*, that the arrangement between *X* and *A* was not illegal or opposed to public policy or the terms of the original lease as *A* was not given any right to interfere with the business of the partnership and that *A* was not prevented under the Madras Salt Act from claiming a share in the profits to which *X* would be entitled to in respect of the partnership business.

Appeal against the decree of the District Court of Kistna at Chilakalapudi, dated 18th November, 1941, and passed in A. S. No. 35 of 1941 preferred against the decree of the Court of the District Munsiff of Masulipatam in O. S. No. 451 of 1937.

*P. Satyanarayana Rao* for Appellant.

*V. Govindarajachari* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit for settlement of accounts and for recovery of the plaintiff's one-fifth share. The appellant is the first defendant. He, along with defendants 5 and 6, had obtained certain lands on lease from the Government on the 11th September, 1918, for a period of 25 years for the purpose of manufacturing salt. Subsequently on the 17th November, 1918, there was an agreement between the plaintiff in the suit and the first defendant under which it was agreed that the plaintiff should have one-fifth share out of the one-third share which the first defendant had in the business, and subject to the terms of the lease deed and the conditions which the Government and its officers might lay. In accordance with the said agreement the first defendant agreed that the profits and losses will be borne in the shares as stated above. Subsequently some of the lands demised under Ex. I were not suitable for the purpose for which the lease was taken and hence there was a subsequent lease under Ex. II for the unexpired portion of the lease term, namely, for a period of 22 years. It is the plaintiff's case that this lease was only a modification of the lease of the 11th September, 1918, and therefore he was entitled to the benefits of the same. He therefore sued for a settlement of accounts between himself and the first defendant. Defendants 2 to 4 are the sons of the first defendant.

Various pleas were raised of which it is necessary to state only two. One was that the agreement between the plaintiff and the first defendant was invalid as being illegal and opposed to public policy and that the plaintiff could not enforce any rights under the agreement. The second was that the agreement was enforceable if at all only in respect of the rights under Ex. I and therefore no claim could be made in respect of the rights conferred under the lease deed, Ex. II. The issues relating to these two pleas were tried as preliminary issues and the District Munsiff dismissed the suit upholding the contention of the first defendant. On appeal the learned District Judge of Kistna disallowed both the pleas, found that the agreement was valid and legal and was enforceable and that the contract must be construed to relate to the subsequent lease under Ex. II also. He therefore allowed the appeal and remanded the suit for disposal on the other issues. Hence this appeal.

The only two points for consideration are (1) whether the agreement evidenced by Ex. A is illegal and opposed to public policy and is not enforceable and (2) whether the plaintiff is entitled to enforce the agreement even in respect of the rights conferred under Ex. II. Before dealing with the contentions of the appellant we should bear in mind what the legal relationship between the parties is. Ex. I shows that defendants 1, 5 and 6 obtained a lease from the Government in respect of certain lands with all the salt-pans and brine-pans in them. The lease was for 25 years and the parties were at liberty to determine the lease after giving notice which will have effect at once and six months time was allowed for the removal of the salt by the lessees. The land was to be exclusively used for the manufacture, storage and sale of salt and works connected with it. The lessees were not to erect any dwelling houses nor remove brine in unmanufactured state. The lessees were to pay the land tax, assessment and all taxes. It was further stated that the lessees shall be granted a modified excise license for manufacturing salt and they should observe the terms of such license or any statutory modifications thereof

which the Government of Madras might in its discretion make. There was another provision that the lessees shall not, except with the written consent of the lessor assign, sublet or part with the possession of the leased land or any portion thereof and shall not transfer by sale or otherwise the powers granted to them. There was also a proviso that nothing contained therein shall prevent the lessees at any time from taking any partner or partners into the business carried on by them under the lease who may be approved by the Commissioner. The lease itself was in connection with a partnership arrangement as between the first defendant and defendants 5 and 6. Each of them was entitled to one-third share in it. Under the agreement evidenced by Ex. A it is only the first defendant that took the plaintiff in partnership. It is therefore clearly a case of sub-partnership and that was what was urged for the first respondent before me. As a matter of fact even in the appeal memorandum ground No. 2 the relationship is described as a sub-partnership.

Under section 29 of the Indian Partnership Act,

"(1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners, to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

Thus it will be seen that a sub-partner like the plaintiff has got only a right to receive a share of the profits of the transferring partner. He has no right to interfere with the conduct of the business or even to inspect the accounts of the firm. In short he has nothing to do with the business except a claim to a share in the profits which his transferor will be entitled to. This has to be borne in mind in considering the pleas raised by the first defendant. The first defendant's case is that under the terms of the leases Exs. I and II the lessees can take only a partner who is approved by the Commissioner, and as no such approval had been obtained in this case the partnership agreement runs counter to one of the conditions provided in clause 11 of the lease, and as by the transfer the plaintiff will have all the powers which the first defendant has, he would be exercising all the privileges of a licensee without getting one and consequently such a transfer is illegal and opposed to public policy. The first Court held that as the terms of the lease directed the approval of the Commissioner before any partner is taken and as Ex. A the agreement in question was entered into subject to the conditions of the lease and the previous sanction or ratification has not been obtained the suit is not maintainable. The learned District Judge on appeal pointed out that all that the plaintiff did in this case was to advance money, that he had nothing to do with the manufacture of salt, that he did not interest himself in the manufacture, that the first defendant himself as D. W. 1 did not say that the effect of Ex. A was to assign or sub-let the demised premises or to confer upon the plaintiff any control over the manufacture of the salt and that consequently Ex. A was not opposed to public policy and that it did not violate any terms of the lease. Thus it will be seen that from the nature of the agreement evidenced by Ex. A, namely, a sub-partnership and from what actually happened it was clear that the plaintiff had nothing to do with the business of the manufacture of salt and all that he did was to advance money to the first defendant for the business and that all that he sought was a share in the profits which the first defendant will be entitled to get. As pointed out by the learned District Judge the inclusion of an unqualified person in a business or trade who is prohibited by the statutes from carrying on that particular business or trade would not be within the mischief of the statutes prohibiting such persons from carrying on the trade when such person has nothing more than a claim to a share in the profits arising from the trade or business (*vide* Lindley on Partnership, 8th edition, page 114). As a matter of fact, in *Champsay Dosse* v. *Gordhandas Kessowji*[1] it was pointed out that

1. (1917) 40 I.C. 805.

where a license prohibited the licensee from subletting the whole or part of the privilege, a transfer of the lease or license under which the transferee had no right to manufacture or vend salt but is only entitled to share in the profits, it would not amount to sub-letting or alienation of the privilege. The case was taken up to the Privy Council in appeal and the ruling of the Bombay High Court was confirmed (vide *Gordhandas Kessowji* v. *Champsay Dosse*[1]). Similarly, in *Nazaralli Sayed Imam* v. *Bahmiya Dureyatimsha*[2] which was a case in connection with a license granted by a forest officer under the Forest Act, it was held that an agreement to share profits was valid even though the license issued by the forest officer prohibited assignments and sub-leases without the permission of that officer.

Learned counsel for the appellant cited a number of rulings which I should think have no application to the facts of this case. In *Ismalji Yusufali* v. *Raghunath Lachiram*[3], the defendant in the suit had obtained a lease of certain salt-pans to manufacture salt under a license. Under the terms of the lease deed the lessee was not entitled to sublet the salt-pans without the written permission of the Collector. Without such permission he sublet the pans to plaintiff from whom he received a sum of Rs. 1,000, as security for the performance of the conditions of the sub-lease. The sub-lease was acted upon and the sub-lessee brought a suit for recovery of the deposit from the other party. The plea raised was that the deposit formed part of the consideration for an agreement which was forbidden by the law. The plea was upheld and the suit was dismissed. But then in that case it was pointed out that :

> " The real object and necessary effect of the agreement between the appellant and the respondent was to enable the latter to manufacture salt without a license in the guise of a sublease, although that was forbidden by law and the terms of the license."

Further under the Bombay Salt Act under sections 11 and 47 no salt can be manufactured and no natural salt and, except under the provisions of section 14, no salt earth shall be excavated or collected or removed, otherwise than by the authority and subject to the terms and conditions of a license to be granted by the Collector, and contravention of this was punishable with fine or imprisonment. But in this case, being a sub-partner of one of the three partners to whom the lease and license was granted, he was not entitled to interfere in the business by reason of section 29 of the Indian Partnership Act, and as a matter of fact in this case he did not take any part in the manufacture of salt. He only advanced money and claimed a share in the profits which fell to the share of the first defendant. Moreover there is no such prohibition in the Madras Salt Act. Under section 11 of the Madras Salt Act licenses are transferable and may be relinquished, through there is a proviso that no transfer or relinquishment shall have any effect as against the Collector of Salt Revenue unless and until it has been registered or except under such rules as he may from time to time prescribe.

The decision of the Full Bench in *Rama Naidu* v. *Seetharamayya*[4] also has no application to the facts of this case. There a promissory note was executed by the successful bidder of a toddy shop in favour of another for advances made by the latter for carrying on the business which they agreed to work as partners. The suit filed for the recovery of money on the promissory note was dismissed on the ground that the partnership was formed for illegal purposes inasmuch as section 27 of the Abkari Act had been contravened. Section 27 of the Abkari Act runs thus :

> " No privilege of supply or vend shall be sold, transferred or sub-rented without the Collector's previous permission. Nor, if the Collector so orders shall any agent be appointed for the management of any such privilege without his previous approval."

Section 37 provides for penalties to be inflicted on the infraction of any of the conditions of the license by the transferee. That was a case of a sole toddy renter taking a partner and such a partner will be entitled to carry on the business under the terms

1. A.I.R. 1921 P.C. 137.
2. (1915) I.L.R. 40 Bom. 64.
3. (1909) I.L.R. 33 Bom. 636.
4. (1934) 68 M.L.J. 570: I.L.R. 58 Mad. 727 (F.B.).

of the Indian Partnership Act. In this case there is not a partnership, but only a sub-partnership that was created under Ex. A. The license was in the names of all the three partners, namely, defendants 1, 5 and 6 and the plaintiff who claims the right under the agreement, Ex. A, being only a sub-partner could not claim a right to interfere in the business of the manufacture of salt.

In the case reported in *Nalani Padmanabhan* v. *Sait Badrinath Sarda*[1], two persons were partners of an opium revenue license by the Government and they obtained the license. Both of them together without the sanction of the Collector entered into an agreement with another by which they admitted him as another partner in the business. A suit for dissolution of that partnership was dismissed on the ground that the agreement was void. That was not a case of sub-partnership. As both the partners together admitted the third he was entitled as a partner to do everything that a partner could do. So that case also has no application to the facts of this case which is one of sub-partnership.

*Hadibandhu Behan* v. *Gopal Sahu*[2], also was a case of a partnership between a licensee and another and not a case of sub-partnership. *Narasimhalu Naidu* v. *Nagappa Reddi*[3] also was a case of partnership between the licensee of a toddy shop and another. In none of these cases had the question to be considered whether when a person by reason of the assignment or transfer is only entitled to a share in the profits and had no right to do anything connected with business, or to do any act prohibited by the license or by the statutes, the agreement could be said to be opposed to public policy or to be illegal. It is only if by reason of the agreement in question the plaintiff is enabled to do without license acts which a person with a license alone could do and is enabled to enjoy privileges which a licensee only could, it could be said that the transfer indirectly enabled the person to do an illegal act. Neither under Ex. I or Ex. II nor under the Madras Salt Act is a sub-partner like the plaintiff prevented from claiming a share in the profits to which one of the partners would be entitled to in respect of the partnership business. I therefore find that the learned District Judge was justified in finding that the agreement was not illegal inasmuch as the agreement only conferred on the plaintiff a share in the profits which the first defendant would be entitled to and as Ex. A does not give him a right to interfere with the business of the partnership.

The only other question is as to whether Ex. A relates to the lease under Ex. II also. This is mainly a question of fact, and the learned District Judge has found that it comprises that also. On the date on which the agreement evidenced by Ex. A was entered into there was only the lease evidenced by Ex. I, and from the evidence of D. W. 1, and also from the terms of Exs. I and II, it will be seen that some of the items leased under Ex. I were given up and the fresh lease was executed in respect of the other property as well. As a matter of fact the first defendant as D. W. 1 states that a portion of the lands granted under Ex. I was taken away and some new lands were added in the lease granted under Ex. II. The fact that Ex. II was only for the unexpired portion of Ex. I, namely 22 years, goes to show the connection between the two and I therefore find that the learned Judge was justified in finding that Ex. II was granted in lieu of Ex. I and it was therefore an after acquired property of the same partnership of which defendants 1, 5 and 6 were partners. The mere fact that such a partnership acquired fresh property after giving up the property which it originally had, does not disentitle the plaintiff from seeking a share in the profits which the first defendant will be entitled to in that partnership. I therefore find that the learned District Judge was right in finding that under the terms of Ex. A he will be entitled to a share even in respect of the profits of the lease evidenced by Ex. A. In the result, the appeal fails and is dismissed with costs.

Leave refused.

K.S. *Appeal dismissed.*

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1. (1911) 21 M.L.J. 425 : I.L.R. 35 Mad. 582. 3. (1940) 2 M.L.J. 694.
2. I.L.R. (1943) Pat. 334.

## [PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay).

PRESENT :—LORD ATKIN, LORD PORTER AND SIR GEORGE RANKIN.

Bilasrai Joharmal and another .. *Appellants**

*v.*

Shivnarain Sarupchand and others .. *Respondents.*

*Trust—Charitable trust carried out in foreign country—Trustees in Bombay—Jurisdiction of Bombay High Court to interfere with administration—Removal of trustees—Remedy to be sought in foreign Court and not in Bombay.*

Where a charity (a hospital) had to be conducted in a foreign country (an Indian State) and the Court was for that reason in no position to supervise its administration effectively, no doubt the Court will protect and preserve the funds of the charity by the exercise of its jurisdiction over the trustees or other persons. But the proper conduct of the charity and the giving of any directions for the purpose will be another matter.

Where the Court is asked to remove the trustees and appoint new trustees it will be a correct exercise of discretion that the British Indian Court should leave the plaintiffs to their remedy from the Courts of the country in which the charity is carried on and whose poor are the beneficiaries of the charity. It would be plainly inconvenient if not intolerable that the Courts of a foreign country should interpose authority upon particular questions arising in the course of administering such a trust—acting intermittently according as they may be invoked by particular complainants in preference to the country in which the charity was meant to operate and enforcing their orders by removing the trustees and entrusting to others the management of all the charity and its affairs.

*Sir Herbert Cunliffe, K. C.*, and *S. P. Khambatta* for Appellants.

*Sir Thomas Strangman, K. C.*, and *R. T. Gibson* for Respondents.

Their Lordships' Judgment was delivered by

SIR GEORGE RANKIN.—The appellants on 2nd September, 1939, with the sanction of the Advocate-General, brought a suit on the Original Side of the High Court at Bombay under section 92 of the Code in respect of a public charity. The charity concerned is a hospital at a town in the Jaipur State called Bagar. It was established in 1926 for providing medical relief to the poor and was called Shivnarayan Joharmal Bagar Hospital. The plaint asked that the defendants, who were five in number, should be removed from their office as trustees and that new trustees be appointed by the Court. It also asked for accounts to be taken of the defendants' management, on the footing that they had been guilty of misapplying the funds of the trust; but it is now plain that this allegation is wholly without substance and that the sole ground of complaint is that the defendants have without authority changed the name of the hospital to Shivnarayan Chiranjilal Rungta Hospital and are employing this new style both in bills, papers and labels of the hospital and on the rent notes issued in respect of the property in which the funds are invested.

The learned trial Judge, Chagla, J., by his decree of 10th October, 1941, removed the trustees and appointed new trustees. He directed the defendants to hand over to the new trustees the trust properties in their possession, together with all the books of account, papers, vouchers, documents, etc., relating to the hospital, but the decree contains no provision giving relief against misapplication of trust monies and no direction for accounts. On appeal, Beaumont, C.J., and Somjee, J., set aside this decree and dismissed the suit; and from their decree dated 19th March, 1942, this appeal is brought.

Defendant 1 is Shivnarayan, and Joharmal is the name of his brother. Rungta is their family name. Bilasrai, plaintiff 1, is one of the two sons of Joharmal—the other Govindram, having been given in adoption to Shivnarayan, whose only son Chiranjilal died in 1922. Shivnarayan and his brother are natives of Jaipur and come from Bagar. Both plaintiffs are described in the cause title as "of Bagar." The history and nature of the charity is sufficiently disclosed by two deeds. The first is dated 21st April, 1936, and recites that in or about 1926, Shivnarayan had

* P. C. A. No. 6 of 1943. 21st December, 1943.

set apart the sum of one lac for the purpose of establishing and maintaining a hospital at Bagar and that the sum standing to the credit of the fund with the family firm had increased to Rupees 1,42,079. It provides that Shivnarayan (defendant 1), Bilasrai Joharmal (plaintiff 1), Bholaram Hardatrai and Onkarmal Pannalal (defendants 3 and 4), together with one Brijlal Ramjidas, should be trustees. They were to apply the trust monies in establishing and maintaining "a hospital or hospitals in Bagar or elsewhere for providing free medical aid to the poor people." Clause 3 was as follows :

> "3. The said trust moneys, securities, investments and the properties forming part of the trusts shall be called Shivnarayan Joharmal Bagar Hospital Trust Fund and the hospital or hospitals established by the trustees out of the trust funds shall be called Shivnarayan Joharmal Bagar Hospital or Hospitals. The said trust moneys, securities, investments, etc., shall be kept in the said Shivnarayan Joharmal Bagar Hospital account."

The second deed is dated 12th May, 1939. It recites that Brijlal Ramjidas and the plaintiff Bilasrai Joharmal had resigned from the trusteeship, that pursuant to a decree of the High Court at Bombay dated 15th October, 1937, certain immovable property in Bombay known as Chowpatty Chambers had in 1938 been acquired for the trust as an investment of its funds, and that in addition to this property the trust was possessed of Rs. 81,800 in deposit with a Calcutta firm. By the operative clauses of this deed Shivnarayan Bholaram and Onkarmal appoint as new trustees Hariram Banarsidas and Motilal Nath (defendants 2 and 3 in the present suit). This deed ends by providing :

> "And whereas the whole of the moneys subject to the trusts of the said deed poll deed of trust were contributed by the said Shivnarayan Sarupchand alone and the said Shivnarayan Sarupchand has requested the continuing and the new trustees that the charities created thereunder should henceforth be known by the name of 'The Shivnarayan Chiranjilal Rungta Hospital Charities' the continuing and the new trustees hereby declare that the name of the charities created by and subject to the trust of the said deed poll deed of trust shall henceforth be and be carried on in the said name of 'Shivnarayan Chiranjilal Rungta Hospital Charities.' "

From the plaint (para 4) it would appear that for some time the family name, "Rungta" had been used instead of the word "Bagar" in the title. However that may be, the effect of the change proposed by the deed of 1939 was to remove the name of "Joharmal" from the title of the charity and to put in its place the name of "Chiranjilal," the deceased son of Shivnarayan. That this should give offence to Joharmal and his son Bilasrai was perhaps only to be expected. Shivnarayan by his written statement makes the case that when he first provided the sum of one lac to found the charity he included his brother Joharmal's name in its title because Joharmal promised to contribute to its funds equally with himself. Of this allegation, however, there is no proof; but it is clear that while Joharmal is a co-owner of the site on which a hospital in Bagar has been built, Shivnarayan is the founder of the charity and has out of his own funds endowed it with large sums. A new hospital has been built and equipped at Bagar at a cost to Shivnarayan of some four lacs, and in addition thereto three lacs have been invested by him on behalf of the trust in property in Bombay. His removal from the office of trustee is therefore a drastic measure not readily to be justified in the interests of the charity or of the poor of Bagar.

The learned trial Judge refused to apply the principle that he ought not to interfere in the administration of a charity which is carried on within the borders of an independent State. He appears to have accepted as well-settled the rule that if the Court is not in a position to supervise the carrying out of a charity it will not frame a scheme in respect of that charity but will take such steps only as are necessary to safeguard such trust funds as lie within the jurisdiction : *Advocate-General* v. *Bai Punjabai*[1] and *Kanji* v. *Advocate-General*[2]. But he took the view—somewhat unreasonably, as their Lordships think—that if the name was changed without proper authority the application of the hospital funds to the hospital was a mis-

1. (1894) I.L.R. 18 Bom. 551.
2. A.I.R. 1916 Bom. 225.

application of those funds and amounted to a breach of trust which required the Court to safeguard them. Further, he took strong exception to the defendants' conduct, in that on 13th February, 1941—that is, pending suit—they had presented a petition to the Jaipur "Court of Nizamat Shekhawati" asking that the change of name might be ratified and confirmed. While acquitting them of dishonesty or moral turpitude, he suggested to their counsel that if they were prepared to resign he "might consider the question of condoning their breach of trust," and as this was not acceded to he removed them from office. In their Lordships' view this method of dealing with the matter is open to serious criticism even on the assumption that the defendants' conduct amounted to a breach of trust which the Court was called upon to correct. If the learned Judge had ordered the defendants to restore the original name they might or might not have obtained a stay of his order and appealed from it. If they failed to comply with it, a motion to remove them or to commit them could have been made in due course and upon proper materials. But to require them to resign, and on their refusal to direct their removal from office was to take action far in excess of anything that was called for. The defendants' refusal to resign added nothing whatever to the case against them.

Their Lordships agree with the Appellate Bench in holding that the petition to the Jaipur tribunal was not an act in defiance of the High Court of Bombay; that a charity does not change its nature merely by a change of name; and that on any view the change of name was not such a serious breach of trust as to justify the removal of the trustees. The learned Chief Justice further observed:

> "Now this charity, as appears from the plaint, is a foreign charity. It conducts a hospital in Jaipur State, and it is a well established principle that the administration of a charity depends upon the law, and is controlled by the Court, of the country where the charity is conducted. In my opinion, there is no jurisdiction in this Court to remove trustees of a charity functioning in Jaipur State, and to appoint new trustees of that charity."

The correctness of this view of the law has been challenged in argument by Sir Herbert Cunliffe on behalf of the appellants, who has insisted on the facts that the trust was originally created in Bombay with monies then lying in Bombay; that these were invested in Bombay property pursuant to an order of the High Court of Bombay; and that the breaches of trust complained of had been to some extent committed in Bombay in connexion with the rent notes and other papers. He pointed also to the words "hospital or hospitals in Bagar or elsewhere" which appear in clause (1) of the deed of 21st April, 1936.

It does not appear that any objection was taken at the trial to the jurisdiction under clause 12, High Court's Letters' Patent, and their Lordships are satisfied that there was no defect of jurisdiction in that sense. As a Court of Equity acts in personam it may and sometimes does exercise its jurisdiction over trustees and others in respect of foreign land and otherwise in connexion with rights to property situated abroad. The question here, however, is as to the principles which the Court will observe in taking upon itself to interfere with the administration of a charity when that charity has to be conducted in a foreign country and the Court is for that reason in no position to supervise its administration effectively. That the Court will protect and preserve the funds of the charity by the exercise of its jurisdiction over the trustees or other persons is very certain. But the proper conduct of the charity and the giving of any necessary directions for that purpose are another matter. In this case the Court was asked to make an order which affected the administration of the charity at every point—namely, an order for the removal of the persons who were conducting the management of the hospital and for the transfer to other persons of the land and buildings at Bagar as well as of the immovables in Bombay in which the money of the charity was invested. The words "or elsewhere" in the deed of 1936 do not seem to be important for the present purpose, seeing that the only hospital belonging to the trust was at Bagar and that no other charity was being conducted by the trustees. Once it is admitted that part of the cause of action arose within the jurisdiction so as to satisfy the

requirements of clause 12, Letters Patent, no great importance attaches to the place where the trust was created or its money invested, if there is no question of preserving or recovering its property and if the only question is as to the country whose Courts should supervise the conduct of the charity and the application of its funds. The jurisdiction of the Court to remove trustees, as Lord Blackburn said in *Letterstedt* v. *Broers*[1] "is merely ancillary to its principal duty, to see that the trusts are properly executed." And he added that:

> "in exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle . . . that their main guide must be the welfare of the beneficiaries."

The learned Chief Justice has pointed out that no evidence was given upon the question whether the law of the Jaipur State permitted trustees to alter the name of a charity such as this without the order of the Court; and that if any Court can sanction such a change or condone the action of the trustees in making it, the proper Court for the purpose must be that of the Jaipur State. The case is not one of founding a charity abroad, or settling a scheme for a charity to be conducted abroad, nor of preserving the property of a foreign charity, nor of assisting a foreign charity or a foreign Court to collect or administer funds within the jurisdiction. Their Lordships cannot doubt that upon settled principles it was a correct exercise of discretion by the High Court of Bombay that it should leave the plaintiffs to their remedy from the Courts of the country in which this hospital is carried on and whose poor are the beneficiaries of the charity. It would be plainly inconvenient if not intolerable that the Courts of a foreign country should interpose their authority upon particular questions arising in the course of administering such a trust—acting intermittently according as they may be invoked by particular complainants in preference to the Courts of the country in which the charity was meant to operate, and enforcing their orders by removing the trustees and entrusting to others the management of all the charity and its affairs. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of respondents 1, 3, 4 and 5.

Solicitors of Appellants: *T. L. Wilson & Co.*

Solicitors for Respondents: *Lattey and Dawe.*

K.S. ——— *Appeal dismissed.*

## [PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad.)

PRESENT:—LORD ATKIN, LORD PORTER, AND SIR GEORGE RANKIN.

Sm. Ashtbhuja Ratan Kuer .. *Appellant**

*v.*

Thakur Devi Baksh Singh and another .. *Respondents.*

*Succession Act (XXXIX of 1925), sections 270, 271 and 273—Petition for the grant of letters of administration with will annexed—Bulk of property in Oudh and only small portion in Agra—District Court in Agra province has jurisdiction to grant petition—Section 271 merely confers a discretion and does not affect jurisdiction—Section 273—"Province" if means amalgamated province of Agra and Oudh—Property over which grant of letters of administration will have effect.*

Where although the whole of the testator's property was within the United Provinces of Agra and Oudh yet by far the larger and more valuable part of it was in Oudh and only a portion small in quantity and value was situated in Agra, the District Judge of Benares (which is within the Province of Agra) has jurisdiction to grant letters of administration with the will annexed. Section 271, Succession Act does not go to jurisdiction but to discretion.

The questions as to the property over which such a grant has effect, and whether the word "province" in section 273 of the Succession Act means only the province of Agra or the amalgamated province of Agra and Oudh were left open.

1. (1884) 9 A.C. 371.

* P.C. Appeal No. 31 of 1941. 21st December, 1943.

*C. S. Rewcastle* and *R. K. Handoo* for Appellant.

Respondents *Ex parte.*

Their Lordships' Judgment was delivered by

LORD PORTER.—This appeal from a decree of the High Court at Allahabad dated 15th April, 1937, concerns the genuineness of an alleged will of one Thakur Ambika Bakhsh Singh.

The main questions for determination are: (*i*) whether on the evidence before the Courts in India the genuineness of the will was established; (*ii*) whether the grant of the letters of administration *cum testamento annexo* by the District Judge of Benares (which is within the "province" of Agra) is invalid on the ground that although the whole of the testator's property was situated within the United Provinces of Agra and Oudh, yet by far the larger and more valuable part of it was in Oudh and only a portion small in quantity and value was situated in Agra.

On 1st October, 1904, the testator is said to have executed in Jaunpur in Agra a will by which he gave successive life interests in his estate of Nanemau to (*a*) his elder brother's widow; (*b*) his own senior wife; (*c*) his own junior wife, and thereafter in the events which happened to his posthumous daughter, who is the appellant before their Lordships' Board.

The testator is described in the document as being and in fact was Talukdar of Nanemau, District Sultanpur, Oudh.

The will is a lengthy document which sets out firstly his title to the property, secondly his relatives who were living and dead and thirdly his reason for making a will at that time. It then goes on to deal with the succession to his estate in the manner set out above. Its terms are somewhat garrulous and ingenuous but not perhaps, unnatural in a man of the testator's position more particularly as he appears to have been influenced by the death of his brothers, which occurred at a comparatively early age, and by the prognostications of an astrologer who foretold danger to the testator's life in his 35th and 36th year, that is, about a year after the date of the making of the will. The will concludes in para 8.

"Paragraph No. 8.—I will keep this memorandum of will having enclosed it in an envelope at such a place that after my death no one except the three Thakurains have access to it and I will write a slip in Hindi giving instructions that whoever may find it should not disclose it but should at once get it posted in some distant post office, and probably she will do so. I have thought of this plan so that there may be no friction among the three Thakurains and no Thakurain should bring any accusation against another Thakurain that the Talukdar had done this in consultation with her, otherwise it will be a cause of ill-feelings among them. The envelope in which this memorandum will be enclosed will bear an address so that it may be presented before His Excellency the Governor-General of India in Council and His Excellency will be graciously pleased to send it to that officer who will fully take into consideration the conditions laid down herein because I do not know what department should deal with it and which officer is competent to consider over the contents thereof."

The testator died on 13th August, 1905, at about the age of 35 or 36, leaving (*i*) his elder brother's widow, (*ii*) his own senior widow, (*iii*) his own junior widow, alive at his death. The appellant, who is the testator's daughter by his junior widow, was born posthumously on 31st October, 1905.

After his death someone appears to have carried out certain directions as to the despatch of a will of the testator to the Government of India, since, when the will in dispute was afterwards produced in the manner described later, there was attached to it a memorandum of the Government of the United Provinces addressed to the testator and there was written upon it an endorsement in red ink.

(1) The memorandum is in the following terms:

"REVENUE DEPARTMENT.
Dated, Allahabad, 25th January, 1906.

Office Memorandum.

The undersigned is directed to acknowledge the receipt of a document dated 1st October, 1904, purporting to be the will of Babu Ambika Bakhsh Singh, Talukdar of Nanemau, Sultanpur District,

which has been transferred by the Government of India, Foreign Department, to this Government for disposal; and to say that the will should be registered under the Indian Registration Act (III of 1877)

(Signed Illegible).

Under-Secretary to Government, United Provinces.

To Babu Ambika Bakhsh Singh, Talukdar, Nanemau, District Sultanpur."

(2) The endorsement is as follows: "P.B.R. No. 1036. Received 20th November, 1905."

It was suggested in the Courts below that P.B.R. means Persian Branch Register and that it is possible that the document which was in "Urdu" was sent to that Register for translation. The Government of India although approached after the issue of the plaint for further information on the matter were unable to supply any, inasmuch as they have destroyed the relevant records for 1905.

The letter, however, is obviously genuine and no doubt as to its authenticity was raised in the Courts in India.

It is not known who sent some will (whether this or other) to the Government of India but the later history of the document is as follows:

One Nazir Ahmad, a muktar who had been employed on the estate during the testator's lifetime and after his death continued to act on behalf of his junior widow, kept a locked box, the contents of which are said to have been unknown, until he left the service and the estate in 1919. About a year after his departure, one Raj Narain who had been appointed to succeed him opened the box in the presence of the junior widow and others on receiving information (as he alleged) that Niaz Ahmad had died. In the box was found the will and letter and both were handed to the junior widow, who shortly afterwards presented the will for registration to the sub-registrar at Jaunpur.

The sub-registrar accepted the will for registration under rule 41 (2) and held that, as the senior widow was dead, the junior was competent to produce the will under section 40, Registration Act. Accordingly the will was registered on 20th January, 1920.

On 11th April, 1929, the appellant as posthumous daughter and residuary legatee of the testator and as his heir presented a petition in the Court of the District Judge of Benares under section 232, Succession Act, 1925, for letters of administration with copy of the will annexed. In her petition she stated (as the fact was) that the testator had not appointed any executor, that those who were appointed life owners or managers had taken no steps to obtain probate or letters of administration, that the testator's elder brother's widow had relinquished her rights in favour of the testator's senior widow, that the latter had died in 1908 and that the junior widow was in possession of the testator's estate.

Objections to this petition were filed by a number of persons but only those of Debi Baksh Singh and Lal Bhupendra Narain Singh dated 14th December, 1929, and 18th January, 1930, respectively, are now relevant, the others having been withdrawn. Debi Baksh Singh claimed to be a "near reversioner" and contended that: (*a*) the Court of the District Judge of Benares had no jurisdiction to entertain the petition as all the property of the testator was situate in the province of Oduh; (*b*) the will was a forged document; (*c*) the registration at Jaunpur was invalid and being unregistered the will was not admissible in evidence.

Lal Bhupendra Narain Singh said that under the will he (and not the appellant) as son of the testator's brother's daughter was the sole residuary legatee and was the person best entitled to the grant of letters of administration but he also questioned the jurisdiction of the Court and reserved the right to object to the will on account of certain alterations therein. The last point was disposed of by the District Judge who found that the alterations were made before the testator signed the document. It was not persisted in before the High Court in India, and need not be further considered. On 4th December, 1930, however, the learned District

Judge framed two preliminary issues dealing with this question of jurisdiction namely :

(1) Has the Court jurisdiction to hear this petition.

(2) If it has, should it exercise its discretion under section 271, Succession Act, and refuse to entertain the case.

To the first of these questions the learned District Judge answered "Yes" and to the latter "No." That he had jurisdiction appears to their Lordships plain. Under the terms of section 270, Succession Act, 1925 :

"Letters of administration to the estate of a deceased person may be granted by a District Judge if it appears . . . that the testator or intestate, as the case may be, at the time of his decease had a fixed place of abode or any property movable or immovable within the jurisdiction of the Judge."

Acting upon this provision the learned District Judge decided that inasmuch as some of the property of the testator even though of very small value was admittedly situate in the Jaunpur District at the time of the hearing and property of a greater value at the time of the death, the Court had jurisdiction to hear the petition. Accordingly a decree was eventually passed in the words "It is ordered and decreed that letters of administration with a copy of the will annexed be granted to the petitioner." It is to be observed that this decree does not state over what property or estate it was to have effect. Nor need it do so. Section 273, Succession Act, makes the necessary provision, when it enacts that :

"Probate or letters of administration shall have effect over all the property and estate movable or immovable of the deceased throughout the Province in which the same is or are granted."

It was, it is true, argued on behalf of the petitioner that "Province" in this section was not confined to the Province of Agra, but, since the passing of Act VII of 1902, meant the amalgamated Provinces of Oudh and Agra. The District Judge accepted this view. The High Court on the other hand held that the District Judge of Benares was wrong and the decree was bad because the grant was not in terms limited to the property situate in the Province of Agra but was absolute. No doubt the learned District Judge did take the view that the grant extended over the United Provinces but he has not made a decree to that effect—he has merely worded it in general terms so that it takes effect only over the estate in the province in which the grant was made, whatever that province and that estate may be.

In considering the various issues involved their Lordships have not had the assistance of any case or argument on behalf of the respondents and in their opinion it would, in these circumstances, be undesirable to express any opinion upon a point obviously of difficulty and importance. They will only say that for the reasons they have given, the Court had jurisdiction and leave the decision as to the property over which the grant had effect to an occasion when it is necessary to decide that point. Nor do their Lordships think that the grant was made without jurisdiction because the learned District Judge did not limit the grant to the property within his own jurisdiction. It is true that section 271, Succession Act, enacts that :

"When the application is made to the Judge of a district in which the deceased had no fixed abode at the time of his death, it shall be in the discretion of the Judge to refuse the application, if, in his judgment it could be disposed of more justly or more conveniently in another district, or, where the application is for letters of administration to grant them absolutely or limited to property within his own jurisdiction."

This provision however does not go to jurisdiction but to discretion. In the present case, the genuineness of a will was in dispute and in order to resolve it witnesses had to be called and the documents produced. In their Lordships' view the District Judge had ample evidence upon which to decide that it was proper to hear the petition and to grant the letters of administration absolutely. In so doing, he has considered the matter both on the footing that the grant would have effect over all the property both in Agra and Oudh and also upon the footing that it would have effect over the property in Agra only. In either case he decided to exercise his

discretion in favour of making the grant. Their Lordships think that he had material before him upon which he could properly so exercise his discretion and that there is no reason for interfering with it.

If as their Lordships think the learned District Judge had jurisdiction and was justified in using his discretion as he did there remains the further question whether he was right in finding, as in fact he found, that the will was a genuine one. The High Court came to the conclusion that he was wrong and no doubt there are certain elements which require careful scrutiny and give rise to some suspicion. It is clear that the daughter, who would lose the inheritance of the taluqdari property unless it were devised to her, was interested in the production of a will. It could not be established what will was sent to the Government of India after the testator's death in 1905 or who sent it, nor is it clear who received the letter and will in 1906. The testator employed the clerk to a local vakil in Jaunpur instead of obtaining the services of some well-known vakil in Oudh where most of the property was. The will was not registered within one month of its execution, as is required by section 13, Oudh Estates Act of 1869, though not in respect of Agra, and was found in an unexpected place. Further, when it was registered in Jaunpur, no steps were taken to bring it to the attention of the Deputy Commissioner or the Manager of the Court of Wards which was in control of the estate from 1909 to 1925. All these are matters for serious consideration, but in the first place it was common ground both before the District Judge and before the High Court that the letter from the Secretariat in 1906 is a genuine document. Some will was therefore sent to the Government of India in 1905 and passed on by it to the Local Government. Moreover, the will itself which was in Urdu appears to have been transmitted to P. B. R. which as was suggested may well mean that it reached the Persian Branch Registry for the purpose of translation.

This action is in accordance with the instructions contained in the will itself and is what would be expected if the document sent was the disputed will. That some person or persons should risk forging a fresh will when the genuine one had already reached a government department, and though that department might well have retained a copy of it, seems unlikely. Moreover, the elaborate and somewhat ingenuous terms of the will itself do not suggest the work of a forger. Nor do their Lordships think that the evidence of the attesting witness or to a less degree that of the two persons alleged to have been present at the signing should be put aside as of little or no value. The only attesting witness who was still alive was called, and the learned District Judge who saw all these witnesses accepted their evidence. Had the property been in the possession of someone other than those specified in the will at the time of its finding or before the petition was launched, much might have been made of the delay and failure to notify the Court of Wards, but as it was, for the moment at any rate the terms of the will made no change and there was no urgency to take any step.

The High Court seem to have been much impressed by the fact that Raj Narain who alleged that he had found the will in the box originally stated that his predecessor Niaz Ahmad had died in 1919, whereas afterwards it was established that the death occurred in 1927. The witness was recalled at a later stage, and corrected his evidence by saying that he heard Niaz Ahmad died in 1919. In the circumstances their Lordships cannot regard this mistake as a vital one. To them as to the learned District Judge, who saw the witness, it does not appear unnatural that he should have acted on hearsay and believed his predecessor to have died at the earlier date.

Having regard to the contents of this will, the apparent compliance with them by the sending of it to the Government of India and the evidence of a witness to the will and eye-witnesses of its signature accepted by the learned District Judge, their Lordships think the better opinion is that the will is a genuine one and should be affirmed. They accordingly will humbly advise His Majesty that the appeal should be allowed, the judgment of the High Court set aside, that of the District Judge affirmed, and letters of administration granted in the terms of the decree

of 19th May, 1933. The respondents must pay the costs of the appellant in the High Court and before their Lordships ' Board.

Solicitors for Appellant : *Hy. S. L. Polak and Co.*

Respondents *ex parte.*

K.S. ——— *Appeal allowed.*

## [PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad.)

PRESENT :—VISCOUNT SANKEY, LORDS ATKIN, PORTER AND CLAUSON, AND SIR GEORGE RANKIN.

Martin & Co. and another .. *Appellants**

*v.*

Syed Faiyaz Husain and others .. *Respondents.*

*Electricity Act (IX of 1910)—Right of electric company to place electric wires at a height of 20 feet across public street—Effect on right of Shia Mahomedans to carry* tazias *of more than 20 feet height through the public road as part of a religious procession.*

Where an electric company derived their rights to place wires across the streets at a height of 20 feet under statutory authority (the Electricity Act IX of 1910) they are clearly given the power to abridge the public right to carry through the streets objects of a greater height.

Accordingly the Shia Mahomedans cannot enforce any right to carry tazias of more than 20 feet height through the public road as part of a religious procession. Section 19 of the Electricity Act has no bearing on such a claim. That section, though requiring the licensee to exercise the powers given to him causing as little damage as may be, would give no right to have the lawful exercise of the power restrained even if it necessarily caused inconvenience. Even if a claim to compensation for damage, detriment or inconvenience to public rights could be made it would have to conform to the provisions of section 91 of the Civil Procedure Code and be made with the consent of the Advocate-General.

*Sir Thomas Strangman, W. W. K. Page* and *J. M. Pringle* for Appellants.

Respondents *ex parte.*

Their Lordships' Judgment was delivered by

LORD ATKIN.—These are consolidated appeals from a judgment of the High Court at Allahabad reversing a judgment of the Munsiff at Amroha in the district of Moradabad. Their Lordships have not had the advantage of hearing counsel for the respondents ; but they have been able to consider the careful judgments in the respondents' favour given in the High Court. The plaintiffs are Shia Mahomedans of the township of Amroha, and like other Shias on the tenth day of the Mahomedan month of Moharram they commemorate the death of Husain, a son of Fatimah, the daughter of Mohammed, by passing in a procession along the streets of Amroha. In the procession are carried " tazias " reproductions of the mausoleum of Husain, constructed of wood, paper and tinsel, borne on the shoulders of carriers. They are of various heights and have in some instances reached the height of 27, 30, or more feet from the ground. In 1929, Martin & Co., defendants 3, obtained from the Local Government, pursuant to the Electricity Act IX of 1910, a licence to supply electricity to the municipality of Amroha. The licence was soon after transferred to the Upper Ganges Valley Electric Supply Co., Ltd., of which company Martin and Co. became managing agents. The scheme for the supply of electricity involved placing electric wires across the streets in Amroha, a matter which is dealt with by section 13, Electricity Act. It is only necessary to say that all the provisions of the Act were complied with, due notices were given as required by the Act, the approval of the municipality and the Local Government was obtained, and in due course the company became authorised under the Act to place their wires across the streets at a height not less than 20 feet. The respondents had full notice throughout of the proposals, and exercised their

* P. C. Appeal No. 60 of 1942. 13th December, 1943.

rights to object, but their objections after being considered were put aside by the authorities acting no doubt on their view of the general interests of the public.

In June, 1930, representatives of the present plaintiffs brought a suit against the Municipal Board and Martin & Co. to restrain them from permitting the wires to interfere with the free passage of their tazias. At this time the wires had not been energised, and for the procession of that year a compromise was arranged by which the wires were either lifted or taken down. Immediately after the procession in June 1930, the wires were replaced, and in October 1930, the Local Government by its proper officer authorised them to be energised. In November, 1930, the plaintiffs instituted the present suit claiming a declaration that by old custom they had a right to take out in procession tazias to the height of 27 feet, and an injunction ordering the defendants to raise the electric wires to such a height as not to obstruct the passage of the tazias in procession. The case in the Court of the Munsiff appears to have been fought on the issue of custom. The learned Judge settled issues as to the existence of the alleged custom, and also as to whether, as alleged, according to the Shia religion the taking out of tazias in procession is a necessity, and whether under the Shia religion the reduction of the height of a tazia is not permissible. He found that the evidence was insufficient to establish the alleged custom, and founding himself upon authoritative evidence produced by the plaintiffs themselves he answered both the questions mentioned above in the negative. Finding, therefore, that the custom on which the plaintiffs based their case was not proved, he dismissed the suit.

On appeal, Iqbal Ahmad, J., as he then was, considered that the case did not depend upon custom, though apparently he was of opinion that the alleged custom was proved. But founding himself upon a decision of this Board in *Manzur Hasan* v. *Muhammed Zaman*[1], that in India there was a right to conduct a religious procession "with its appropriate observances" through the public streets, and being of opinion that to carry tazias of the height claimed was an appropriate observance he came to the conclusion that the plaintiffs had established their right. It remained, however, to consider the defence that the acts complained of had been done under statutory authority, a defence which seems to have been seriously argued for the first time on appeal. The learned Judge was of opinion that section 19, Electricity Act, applied to the plaintiff's case :

"(1) A licensee shall in exercise of any of the powers conferred by or under this Act cause as little damage, detriment and inconvenience as may be, and shall make full compensation for any damage, detriment or inconvenience caused by him or by any one employed by him."

The effect of this section was to make the exercise of the powers of the company conditional on their not interfering with the rights of others ; and as the plaintiffs had the right to carry tazias of the height claimed, they were entitled to the declaration and injunction asked for, subject to the rights of the Magistrate to give orders under section 144, Criminal Procedure Code. Bajpai, J., in substance agreed.

Their Lordships are unable to accept the reasons given by the learned Judges. They agree that it is unnecessary to consider the question of custom. The plaintiffs have the right as members of the public to take part in religious processions in the streets : subject of course to the rights of other members of the public to pass and re-pass along the same streets and subject to the powers of the appropriate authorities of controlling traffic and preventing disturbance. This right as a normal user of the highway does not originate in custom. Whether a highway could be dedicated subject to such a custom need not be considered. It is not alleged in the present case, and it is difficult to see how such a situation could arise. The rights of the plaintiffs therefore are no more and no less than the rights of any member of the public, and subject to questions of danger or disorder there seems no reason why a member of the public should not convey along an open street as part of a normal use of the street articles of any height. But as the plaintiffs' rights are those of the public, so where public rights may lawfully be abridged, so may the plaintiffs'. It is

1. (1925) 48 M.L.J. 23 : L.R. 52 I.A. 61 ; I.L.R. 47 All. 151 (P.C.).

unnecessary in this case to discuss the effect of the United Provinces Municipalities Act, 1916, which by section 116 (*g*) vests the streets in the Municipal Board. For, in the present case, the company derive their rights to place the wires at a height of 20 feet under the statutory authority of the Electricity Act: and clearly therefore are given the power to abridge the public right to carry through the streets objects of a greater height. The plaintiffs therefore have had their rights modified in favour of other rights which the authorities acting under the authority of the statute have considered to be to the greater advantage of the public. In their Lordships' judgment, section 19, Electricity Act, has no bearing on the plaintiffs' claim. That section requires the licensee to exercise the powers given to him (in this case the power to place wires 20 feet above the street) causing as little damage as may be: it would give no right to have the lawful exercise of the power restrained even if it necessarily caused inconvenience: the remaining part of the section appears to be an ordinary provision for compensation for injurious affection. But in no case has it any reference to compensation for damage, detriment or inconvenience to public rights such as the plaintiffs'. If any such claim could be made, it would have to conform to the provisions of section 91, Civil Procedure Code, and be made with the consent of the Advocate-General. In the present case for the reasons given no such claim could be made.

Their Lordships in leaving the case wish to emphasize that no question arises of ignoring or depreciating the respect due to the well-established religious beliefs and observances of the plaintiffs. Like any other religious or secular body or any other member of the public their rights over the streets are subject to the present law which may abridge them. In the particular case their objections were obviously carefully considered and were overruled. The legal rights which flow from the decision of the authorities to grant the licence in question are indisputable. For the reasons given, their Lordships will humbly advise His Majesty that the appeal be allowed and the decree of the learned Munsiff restored. The plaintiff-respondents must pay the separate costs of the appellants in both appeals before the Board and in the High Court.

Solicitors for Appellants: *Sanderson Lee and Co.* and *Solicitor, India Office.*

Respondents *ex parte.*

K.S. ——— *Appeal allowed.*

## [PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT:—LORD ATKIN, LORD PORTER, LORD CLAUSON AND SIR GEORGE RANKIN.

Sheth Maneklal Mansukhbhai .. *Appellant**

*v.*

Sheth Chimanlal Kalidas and others .. *Respondents.*

*Practice—Privy Council—*Ex parte *decision—Rehearing when may be granted.*

The Judicial Committee have and always would have, every consideration for an applicant who came and said that without any fault on his part the case had been heard *ex parte* and, wherever he could satisfy their Lordships that he could have put before them some considerations which might have affected their decision, they would be willing to give him an opportunity of being heard again.

*Sir Thomas Strangman* and *R. T. J. Gibson* for Appellant.

*J. M. Parikh* and *V. K. Krishna Menon* for Respondents.

Their Lordships' Judgment was delivered by

LORD ATKIN.—Their Lordships are unable to grant this application. They have, and always would have every consideration for an applicant who came and said that, without any fault on his part, the case had been heard *ex parte*, and,

* P. C. Appeal No. 48 of 1940. 30th November, 1943.

wherever he could satisfy their Lordships that he could have put before them some considerations which might have affected their decision, they would no doubt, be willing to give him an opportunity of being heard again; but the present case is a case which turns upon construction and upon construction only. The High Court from which there was the appeal after going carefully into all the arguments, adopted one construction, and the Board had given a detailed judgment in which they had dealt with the points taken by the High Court and had come to an opposite conclusion. It is not suggested that there is anything which could be said to the Board, if they did grant a further hearing, which had not been considered by the Board in giving their judgment on the previous hearing. In these circumstances it seems to their Lordships that it would be improper to cause the parties to have another hearing which could only have exactly the same result. Therefore, their Lordships will humbly advise His Majesty that this application should be refused with costs.

Solicitors for Appellant: *Lattey and Dawe.*

Solicitors for Respondent: *H. Shepherd.*

K.S. *Application dismissed.*

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## [THE FEDERAL COURT OF INDIA.]

On appeal from the High Court of Judicature at Fort William in Bengal, Calcutta).†

PRESENT:—SIR PATRICK SPENS, *Chief Justice,* SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

The Governor-General in Council .. *Appellant**

*v.*

The Raleigh Investment Co., Ltd. .. *Respondent.*

*Government of India Act (1935), sections 99 and 226—Bar of suit—Suit to recover money paid as income-tax as a result of assessment and demand under provision of law contended to be invalid—Income-tax Act, 1922 (as amended in 1939), section 4 (1) (c) and Explanation 3—If* ultra vires *the Indian Legislature—Section 99—Government of India Act—Construction—Extra-territorial legislation—Powers.*

The plaintiff company incorporated in England and having its main office there and having no business premises in India held the bulk of the shares in eleven companies carrying on business in India, two called the 'rupee companies' being incorporated in India and having their offices in India and the rest called the 'sterling companies' incorporated in England and having their offices there. The 'sterling companies' were controlled in London, where the Board of directors sit, the share registers are situate and dividends are declared. The business in India, where all profits are made, was managed by local boards. The Indian Government levied income-tax and super-tax on the dividends paid to the plaintiff company by the 'sterling companies' in England. The tax was paid under protest and a suit was brought on the original side of the High Court to declare that the words "or, are deemed to accrue or arise" in section 4 (1) (*c*) of the Income-tax Act and Explanation 3 to section 4 (1) of the Act by virtue of which the tax was assessed and demanded were beyond the law-making powers of the Indian Legislature and were therefore void and had no legal effect and for consequential relief. The suit was decreed negativing the plea of the Government that the suit was not maintainable by reason of section 226 of the Government of India Act and that the impugned provisions of the Income-tax Act were *intra vires* the Indian Legislature. On appeal, *held,*

According to section 226, the bar is absolute, if the dispute concerns *revenue,* taking the word 'revenue' in its ordinary sense. The section is not limited to steps taken in the *collection* of revenue. It equally applies to the demand of assessment. A plea under the section is in the nature of a demurrer and it would be anomalous to hold that the decision of such a plea should be postponed till after and be made to depend upon the decision of the case on the merits.

In the circumstances of the case, the 'source' of the dividends paid to the plaintiff company by the 'sterling companies' was British Indian and in making them liable to income-tax on that basis the Indian Legislature was not giving its law any extra-territorial operation. When the attempt is to tax income and not the *corpus* and the question to be considered is the source of that 'income' it is legitimate to take into account the place where the business from which the income is derived is in fact carried on and not to treat the *situs* of the shares in the eye of the law as concluding the matter.

Where the legality of a legislation of a non-sovereign legislature having extra-territorial operation is raised the pertinent question to be considered is whether the particular legislation is authorized by the Constitution Act creating that legislature and defining its powers. Though the statute of

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* Case No. 22 of 1943. 27th March, 1944.

† (1943) 6 F.L.J. 133 (H.C.).

Westminster is not applicable to India, the Constitution Act of 1935 has to be interpreted in the light of the discussions on this subject that had been taking place between 1926 and 1935. The way in which this matter is dealt with in section 99 of the Constitution Act is significant. Sub-section (2) of section 99 is worded not as a provision 'conferring power to make laws,' but as a provision which *assumes* that the preceding sub-section is capable of being read as including the power to make laws even in respect of matters specified in the five cases dealt with in sub-section (2). This is made clear both by the opening words of sub-section (2) and also by the tenor of the sub-section which only purports to obviate objection on the ground of extra-territorial operation. Hence the extent, if any, of extra-territorial operation which is to be found in the impugned provisions is within the legislative powers given to the Indian Legislature by the Constitution Act.

*M. C. Setalvad* (with *G. N. Joshi*) instructed by *K. Y. Bhandarkar*, Agent, for Appellant.

*S. M. Bose* and *S. Chaudhari* (with *Raghbir Singh* and *S. Mitter*) instructed by *P. K. Bose*, Agent, for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice*.—This is an appeal, by the Governor-General in Council, from a decree passed by a Special Bench of the Calcutta High Court exercising its ordinary original civil jurisdiction. The decree declared that the words "or, are deemed to accrue or arise" in section 4 (1) (*c*) of the Indian Income-tax Act and *Explanation* 3 to section 4 (1) of the Act were beyond the law-making powers of the Indian Legislature and were therefore void and had no legal effect, and it directed refund to the plaintiff of a sum of Rs. 4 lakhs and odd paid under protest. The provisions taken objection to by the High Court represent a change introduced in 1939 into the income-tax law of India. It was contended on behalf of the Government (*i*) that the suit was not maintainable, and (*ii*) that the impugned provisions of the Income-tax Act were *intra vires* the Indian Legislature.

The plaintiff—the Raleigh Investment Co., Ltd.—is a joint-stock company incorporated under the English Companies Act, having its registered office at 13, Athol Street, Douglas, in the Isle of Man, and its main office at Egham, Surrey, England. It has no business premises in India, but holds the bulk of the shares in eleven companies which carry on the business of manufacturing and selling tobacco and cigarettes in India. Two of these companies, referred to in the judgments of the High Court as "rupee companies," are incorporated in India under the Indian Companies Act and have their registered office and business headquarters at Calcutta. The nine remaining companies, referred to as the "sterling companies" are companies registered under the English Companies Act. They are controlled in London, where the Board of Directors sit, the share registers are situate and dividends are declared. The Boards in London have constituted Boards which are situate in India. The business in India, where all profits are made, is managed by the local Boards. The ultimate control lies with the London Boards. No share registers are kept in India. The financial policy of the companies is controlled by the London Boards and in all important matters of business the London Boards are consulted. All the general meetings of the companies are held in England. The registered offices of six of the sterling companies are in the Isle of Man and of three others in London; but all the sterling companies have offices in London.

The eleven companies were assessed to income-tax and to super-tax on their income during the year 1938-39 and these taxes have been paid. Dividends were declared by the eleven companies; and, according to statements filed by the plaintiff-company, it received, for the year 1938-1939, a sum of Rs. 75,45,197 as dividend from the eleven companies. Dividends from the two "rupee companies" were paid to a representative of the plaintiff-company in Calcutta. The dividends of the nine "sterling companies" were declared by them in England and paid by them in England to the plaintiff-company in England. The dispute in this case relates to the claim of the Indian Government to levy income-tax and super-tax on the dividends paid to the plaintiff by the "sterling companies."

A brief reference to the scheme of the relevant provisions of the Indian Income-tax Act will help to bring out the points at issue. As is well-known, a large number

of companies not registered in British India are doing business in this country and the Indian Administration has had to face certain difficult questions in attempting to assess to income-tax and super-tax the profits made by such companies, especially when they carry on their business through the mechanism of another foreign company. The difficulty has been greater in respect of super-tax. In the case of companies, super-tax has, under the Constitution Act, to be regarded as being in the nature of corporation tax. Companies are not assessed to super-tax on a graduated scale like individuals or unregistered firms. The Administration accordingly seeks to levy super-tax (properly so called) on the recipients of the dividends. In the case of income-tax, section 49-B of the Indian Income-tax Act provides for the recipient of the dividend being entitled to a proportionate deduction of income-tax with reference to the amount of income-tax paid by the company. But as the basis of the levy of super-tax on the company is, as stated above, different from the basis of the levy of super-tax on individuals, no such deduction as is contained in section 49-B is provided for in respect of super-tax payable on dividends received from companies. Where the recipient of the dividend was resident outside British India, it was held by the Bombay High Court in 1931 (in *Commissioner of Income-tax* v. *Goldie*[1]), that dividends received by him outside British India from companies doing business in British India but registered in the United Kingdom and having their share register there could not be assessed to income-tax in British India, under the Indian Income-tax Act, as it then stood. To meet this situation, certain amendments were inserted in the Act in 1939 and these are the provisions now impugned. It having been enacted by section 3 that the tax shall be charged in respect of " the total income " of the previous year, section 4 proceeds to define " the total income." In respect of income not " received or deemed to be received in British India " by or on behalf of the assessee, the Act creates a category of " income accruing or arising or deemed to accrue or arise in British India " ; and, drawing a distinction in this connection between persons resident in British India and persons not resident in British India, it provides by clause (*c*) of sub-section (1) of section 4 that the total assessable income of a non-resident shall include income which accrues or arises or is *deemed to accrue or arise* to him in British India. By way of amplification of this provision, *Explanation* 3 to sub-section (1) enacts : "that a dividend paid without British India shall be deemed to be income accruing and arising in British India to the extent to which it has been paid out of profits subjected to income-tax in British India."

On the basis of the provisions above referred to, the Income-tax Officer proposed to assess the plaintiff-company to income-tax and super-tax for the year 1939-40 on the sum of Rs. 75 lakhs and odd received by it as dividend for the year 1938-39 from the eleven companies doing business in India. To this proposal the plaintiff took exception, on the ground that dividends declared outside British India could not be regarded as income accruing or arising in British India and added that if the Income-tax Act attempted to impose a liability on such dividends, its provisions would to that extent be invalid. The Income-tax Officer overruled the objection and assessed the plaintiff according to the provisions of the Act. He gave credit to the plaintiff for the sum of about Rs. 11 lakhs already paid by the companies as income-tax and charged under this head a further sum of only Rs. 72,047 (due apparently to a small difference in the rates applicable). Under " super-tax", the plaintiff-company was called upon to pay Rs. 3,73,155-13-0, at a flat rate of one anna per rupee (the graduated scale not being applicable, as the plaintiff was also a company). Under the Act, the plaintiff could have appealed against this order and asked for questions of law being referred to the High Court (*vide* section 66). But the company preferred to pay under protest and filed this suit on the original side of the High Court, asking for a declaration in the terms now granted by the decree appealed against and for consequential relief. The Government filed a written statement, objecting to the maintainability of the suit and insisting that

1. (1931) I.L.R. 55 Bom. 734.

the assessment was valid. On both points, the High Court overruled the defendant's contentions, on the first point, by a majority and on the second point, unanimously. There were other pleas raised, but it is unnecessary to refer to them here, as they have not been argued before this Court.

The only objection to the maintainability of the suit urged before us was based on section 226 of the Constitution Act, which runs as follows :

"Until otherwise provided by the Act of the appropriate legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

It was contended on behalf of the Government that the present suit fell within the description "matter concerning the revenue" in the above provision. Lodge, J., was of the opinion that this objection should prevail; but the Chief Justice and Mitter, J., held that a matter could be held to concern revenue only when the law under which the revenue was claimed was itself valid ; and as they came to the conclusion that the relevant provisions of the law were in this case invalid, they were of the opinion that the suit must be held to relate not to revenue, but to an illegal exaction. The learned Chief Justice said : "In order to decide whether the money has been demanded and paid legally, the Court must first determine whether the impugned legislation is valid or not. The Court is bound to enquire into and decide this matter to ascertain whether it has jurisdiction or not." Dealing with the relevant provisions of the Income-tax Act, he said that they constituted a case of the "Legislature of British India, without specific or apparent authority, stretching out its legislative arm and fiscal hand beyond British India into other countries in an attempt to tax persons and property there not subject to its laws." Mitter, J., described them as a "piece of extra-territorial legislation, not by a supreme or paramount legislature, but by a subordinate legislature." Lodge, J., has not discussed this question, but he expressed his concurrence in the opinion of the other two learned Judges on this point. The correctness of the conclusions of the High Court on both the points has been questioned before us in the appeal.

Taking up first the plea based on section 226 of the Constitution Act, we are, with all respect, unable to concur in the view taken by Derbyshire, C.J. and Mitter, J., on this question. It is true that this section corresponds to a provision enacted more than 150 years ago, in very different circumstances ; and it is anomalous to deny to the High Court in its original jurisdiction power to try questions which a subordinate Court and the High Court itself in its appellate jurisdiction are not precluded from trying. When framing the Constitution Act of 1935, it was open to Parliament to omit or change this provision. But it has not done so. The opening words of section 226 indicate that the attention of Parliament was directed to the question of the expediency of retaining the prohibition in the old form, but Parliament preferred to leave it to the authorities in India to decide the time when and the form in which the provision should be recast. So long as the provision is there, it is the duty of the Court to give due effect to the natural meaning of the words employed. A plea under section 226 is in the nature of a demurrer and it seems to us anomalous to hold that the decision of such a plea should be postponed till after and be made to depend upon the decision of the case on the merits.

The learned Judges say that where the law imposing the revenue is itself illegal, a dispute in relation to it cannot be said to concern the "revenue". This argument, if pursued to its logical limits, will prove too much. If even under a valid revenue law a person who is not liable to be assessed is sought to be assessed to revenue, that claim may well be described as an "illegal" claim against him. Again, there may be a dispute between a tax-payer and the revenue authorities as to whether the tax-payer has or has not paid what was due from him and if on investigation it should be found that he had paid what was claimed as still due, the claim as against him for further payment might well be described as "illegal". If in such cases the Court should be called upon to decide whether the claim was well-founded in law

before applying the bar under section 226, the provision would be practically rendered nugatory. In *Spooner* v. *Juddow*[1], the Judicial Committee held that the section would apply to all cases in which "parties *bona fide* and not absurdly believed that they are acting in pursuance of statutes and according to law". This language will, in our opinion, apply as much to the Indian Legislature acting in the belief that its enactment is authorized by the Constitution Act as to a subordinate authority in India acting in the belief that his or its action is authorised by the Indian law. Section 226 is obviously not limited to steps taken in the *collection* of revenue. It equally applies to the demand of assessment.

It is true that in *Spooner* v. *Juddow*[1], no question was raised as to the legality of the revenue-claim. But the principle enunciated by their Lordships is of general application. Mitter, J., thinks that as their Lordships permitted argument on the question whether the quit-rent which was sought to be recovered in *Spooner* v. *Juddow*[1] was "revenue" or not within the meaning of the section, it is open to the Court, when dealing with a plea under the section, to decide whether the law imposing the revenue is valid or not. With all respect, we think that this inference is not justified. What was argued before their Lordships was a question of interpretation of words and not the very question of right which was in dispute in the proceeding. If, for instance, it could be contended that income-tax could not be included in the meaning of the word "revenue" in the section, the argument would be similar. It might perhaps even be that if the assessment imposed on the plaintiff in this case could not *bona fide* have been regarded or spoken of as income-tax, the limitation imposed by their Lordships on the application of the section could be invoked. The arguments in the case have certainly shown that the dispute between the parties as to the legality of the claim cannot be regarded as other than *bona fide*.

Some reliance seems to have been placed by the learned Judges of the High Court on the decision in *Alcock Ashdown and Co.* v. *Chief Revenue Authority, Bombay*[2]. It is not clear how exactly the learned Judges have used that pronouncement to support their conclusion in the present case; it does not seem to us to throw any light on the question now arising for decision. It turned on the special nature of the relief claimed in that proceeding and there is certainly nothing in that judgment to qualify the principle laid down by their Lordships in *Spooner* v. *Juddow*[1]. In the only reported case where the application of section 226 had to be considered on an allegation that the revenue law itself was illegal, a Special Bench of the Bombay High Court held that "before the section can apply, we must determine that the tax which is challenged is legal". [*See Sir B. Jeejibhoy* v. *The Province of Bombay*[3]]. There is no discussion of the question in that judgment, apparently because the point "was not seriously contested by the Advocate-General" in that case. The authority of that pronouncement does not in any event carry us farther than the considered judgment of the Calcutta High Court in the present case. Mitter, J., refers to the analogy of cases where a Court has power to determine what are called jurisdictional facts if the jurisdiction of the court depends on the existence of certain facts. In such cases, the jurisdictional or exclusionary provisions will ordinarily be of a qualified character and indicate what facts must be found before the jurisdiction can attach or be excluded. But as we read section 226, the bar is absolute, if the dispute concerns *revenue* taking the word "revenue" in its ordinary sense.

The above conclusion as to the effect of section 226 of the Constitution Act would by itself suffice to justify the appellant's contention that the suit should be dismissed. As the case has however been fully argued before us on the merits and we have come to the conclusion that the appellant's contention must succeed even on the point as to the legality of the assessment, we proceed to deal with it, as it

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1. (1848, 1850) 4 M.I.A. 353.
2. (1923) 45 M.L.J. 592 : L.R. 50 I.A. 227 : I.L.R. 47 Bom. 742 (P.C.).
3. I.L.R. (1940) Bom. 58.

would be embarrassing to the Government in the administration of the income-tax law if we should at this stage dispose of the suit merely on the preliminary ground.

The appellant's argument as to the validity of the impugned provisions of the Income-tax Act comprised two contentions : it was first argued that these provisions were not extra-territorial in their operation. It was also argued that even if they should be found in any degree to operate extra-territorially, that would be no ground for holding them to be invalid, so far as municipal Courts called upon to deal with them were concerned. We are of the opinion that both these contentions are well-founded and must prevail. A third argument was advanced, that in any event so much of the provisions as may seem to operate extra-territorially must be held to be valid on the ground that they were ancillary or incidental to the authorized portion of the legislation and were required to make its exercise effective. This last contention, based upon the authority of the decisions in *Attorney-General for Canada* v. *Cain*[1] and *Croft* v. *Dunphy*[2], may be briefly disposed of. The purpose of the impugned provisions is obviously to *increase* the extent of the income which is to be taxed for the benefit of the Indian Exchequer. If such extension should by itself be held to be unauthorized, it is difficult to see how the extension could be held to be necessary for the effective exercise of the power to tax so much of the income as might fall within the authorized limits. The cases relied on bear no true analogy.

In support of the first contention, namely, that the impugned provisions are not extra-territorial, reliance was placed upon the words in *Explanation* 3 to section 4 (1) limiting the assessability of a dividend paid without British India "to the extent to which it has been paid out of profits subjected to income-tax in British India." It was contended that the legislature had thus attempted to tax only such income as had its *source* in British India and that this was clearly within the territorial jurisdiction of the British Indian Legislature. Our attention was drawn to the observations of Lord Herschell in *Colquhoun* v. *Brooks*[3]. where the existence within any particular country of "that from which the taxable income is derived" is spoken of as a "territorial limitation" quite as much as the residence there of the person whose income is to be taxed. Strong reliance was also placed on certain decisions of the High Court of Australia, where dealing with provisions similar to the impugned provisions of the Indian Act or provisions of even wider import, the High Court of Australia has held that they were not invalid on the ground of extra-territorial operation. On behalf of the respondent, it was contended that in a case like the present, the source of income to the plaintiff-company could not be regarded as situate in British India. It was argued that though the sterling companies might earn their profits by business carried on by them in British India, there was no connection between the plaintiff-company and the earning of these profits and that the plaintiff-company derived its income only in England where the dividends were declared by the sterling companies. In support of this contention, reliance was placed on some of the observations of Tomlin, J., (as he then was) in *London and South American Investment Trust* v. *British Tobacco Co. (Australia)*[4]. The judgment of the High Court seems to be mainly based upon these observations. The learned Chief Justice states that the effect of the impugned provisions is "to make liable to tax in British India foreign money measured in a foreign currency paid in a foreign country by one foreign company to another foreign company in discharge of a debt which arose and was payable in that foreign country." Mitter, J., also emphasises the position that the dividend which accrues to a share-holder of a company is income which is quite distinct from the income of the company in which the shares are held, even when the whole of the share capital of the company is held by that shareholder. The Australian decisions have not been discussed by the Chief Justice, possibly because the reports and the relevant statutes were not available in Calcutta. Mitter, J., observes that in two of them, there appears to have been no attempt to tax the non-resident foreigner directly and he adds that in any event

1. 1906 A.C. 542.
2. 1933 A.C. 156.
3. (1889) 14 A.C. 493 at 504.
4. (1927) 1 Ch. 107.

the tests laid down in those decisions cannot be followed here, because " the Indian Constitution is materially different from the Australian Constitution."

The question, in its present form, does not appear to have arisen directly for decision in England ; in view of the difference between the Indian and the English Income-tax laws in their basic scheme, it is scarcely likely to arise. In *London and South American Investment Trust* v. *British Tobacco Co. (Australia)* [1], a certain aspect of it had to be considered incidentally and even that only with reference to certain provisions of the Australian income-tax law. The question has however been considered in several decisions of the High Court of Australia where, conditions of business being in some respects similar to the conditions obtaining in this country, the provisions of the income-tax law also bear some resemblance to the provisions with which we are concerned here. Two of the Australian decisions, *Nathan* v. *Federal Commissioner of Taxation*[2] and *Murray* v. *Federal Commissioner of Taxation*[3], are practically on all fours with the present case. In both the cases, the Court was confronted with the very argument that has been advanced on behalf of the plaintiff here, namely, that though the source of the company's income was Australian, that of the shareholder's was not, because, in the words of Fletcher Moulton, L.J., in *Gramaphone and Typewriter, Ltd.* v. *Stanley*[4], the shareholder did not carry on the business of the company, but was only entitled to the profits of the business to a certain extent fixed and ascertained in a certain way dependent on the constitution of the corporation. This argument was overruled by all the learned Judges.

In *Nathan's case*[2], Isaacs, J., delivering the judgment of the Court, observed that the question as to the source of the share-holder's income was a question of fact to be determined on practical grounds. In both the cases, the Court held that though no individual corporator could lay claim to any portion of the profits made by the company, every corporator had an interest in them. The very observation of Fletcher Moulton, L.J., in the *Gramaphone and Typewriter, Ltd. case*[4], quoted above recognises that the share-holder "is entitled to the profits of that business to a certain extent". The language used by Brett and Cotton, L.JJ. in *Gilbertson* v. *Ferguson*[5], shows that dividends are paid out of profits—and in that sense must have the same source—and this is not affected by the remarks made on that case in *Barnes* v. *Hely Hutchinson*[6]. It is true that the profits of a company may not materialise into a dividend for the share-holder till a dividend is declared, but that is different from saying that when the dividend is declared the " source " of the dividend is not the same as the source of the profits made by the company.

In *Bradbury* v. *English Sewing Cotton Co.*[7], to which Mitter, J., has referred, the American Thread Co., had itself been declared by an earlier decision of the House to be assessable to income-tax on the footing that it *carried on business* in England, because the business in America was controlled from England ; and the question subsequently arose, whether dividends declared in America by the American company, but received in England by an English company which held almost all the ordinary shares in and controlled the American company could (for certain other income-tax purposes) be regarded as "profits received from a foreign possession." This was answered in the negative on the ground that for the purposes of the English Income-tax Acts " the locality of the shares or stock of a company was to be determined by its place of residence and trading." On the question of " source," the following observations of Lord Wrenbury (at pp. 767, 768) are worth noting : " The possession of the English company was of shares which (if a dividend was declared) entitled them to receive from a company resident here a dividend whose source was the differential sum remaining in the hands of the company resident here after that company resident here had paid income-tax upon all its profits." With these we may take the remarks of Viscount Cave in

1. (1927) 1 Ch. 107.
2. (1918) 25 C.L.R. 183.
3. (1921) 29 C.L.R. 134.
4. (1908) 2 K.B. at p. 98.
5. (1881) L.R. 7 Q.B.D. 562.
6. 1940 A.C. 81.
7. 1923 A.C. 744.

*Swedish Central Ry. Co.* v. *Thompson*[1], where, referring to *Bradbury's case*[2], the Lord Chancellor said : " The Crown, having established in *Joyce's case*[3], that the profits of the company during the period in question were for the purpose of taxing the company to be treated as earned here, could not now be heard to say that for the purpose of taxing the share-holders they were earned abroad. *The source of income was the same in both cases.*" (The italics are ours). Here, the Lord Chancellor clearly treats the income of the company and the dividend-income of the share-holders as derived from the same " source." In *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land, Co.*[4], Viscount Haldane, dealing with a Scottish company doing business in Australia and New Zealand, says " what remained as nett balance was remitted to Scotland to be divided as profit " and in the same case (on p. 182) Viscount Finlay states : " If this colonial tax had not existed, so much more would have been available as profits from the business in the colonies for division among the share-holders of the company." True, when a dividend is declared it becomes a " debt " for which the share-holder can sue the company, but that is not a picture of the whole transaction. The company can declare dividends only when it has earned profits ; the real question therefore is where has the money out of which the dividends are declared been earned ? How exactly this question is to be answered when the dividends have passed through more than one company will depend upon the circumstances of each case. No such difficulty arises here.

In *Colonial Gas Association, Ltd.* v. *Federal Commissioner of Taxation*[5] and *Broken Hill South Ltd.* v. *Commissioner of Taxation (N. S. W.)*[6], the Australian High Court went even further than in the earlier cases and held that *interest* paid to a non-resident foreigner on debentures raised in a foreign country might be said to have its " source " in Australia, if the moneys borrowed had been used by the borrowing company for carrying on business in Australia or had been secured by the mortgage of any property in Australia. It is not necessary for the purpose of this case to go so far as the Australian High Court has gone in these later cases. The connection between " interest " payable by the company to its creditors and the " profits " made by the company in its own business is not so direct as that between " dividends" and " profits ", and what is more important, the interest due to the creditor will be payable *whether profits are made or not.* In *Inland Revenue Commissioners* v. *National Mortgage and Agency Co., of New Zealand*[7], the Lord Chancellor observed (in passing) " the holders(of the debentures) or most of them reside in Great Britain and they could not therefore be directly liable to pay income-tax under a New Zealand statute which is necessarily subject to well-known territorial limitations " (p. 544). There are however certain observations in the later Australian decisions which seem to us justified in principle and their appositeness to the present case is not affected by the circumstance that under the Australian legislation the tax payable in respect of the interest was assessed upon the company itself, giving a right to the company to deduct the amount thus paid from the amount payable to the creditor or debenture holder. In *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society*[8], Dixon, J., said: " So long as the statute selected some fact or circumstance which provided some relation or connection with New South Wales and adopted this as the ground of its interference, the validity of an enactment would not be open to challenge." The question was more fully discussed in the *Broken Hill South case*[6]. Latham, C.J., recognised that the case was perhaps an extreme one. It is sufficient for our present purpose to take the principles accepted by Rich, J., in his dissenting judgment. The learned Judge observed (on p. 361) : " I do not deny that once any connection with New South Wales appears, the legislature of that State, may make that connection the occasion or subject of the imposition of a

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1. 1925 A.C. at p. 504.
2. 1923 A.C. 744.
3. 6 Tax-Cas. 1, 163.
4. (1921) 1 A.C. at p. 178.
5. (1934) 51 C.L.R. 172.
6. (1937) 56 C.L.R. 337.
7. 1938 A.C. 524.
8. (1934) 50 C.L.R. 581 at 600.

liability. But, he added, " the connection with New South Wales must be a real one and the liability sought to be imposed must be pertinent to that connection." On the facts of the particular case, he dissented from the conclusion of his brethren because he thought that in respect of the interest sought to be assessed in that case, there was no necessary relation between it and the existence in New South Wales of some item of property comprised in a security to which directly or indirectly the tax-payer might resort if the interest was not paid. As he said on p. 362, the tax was there laid upon income which was not necessarily derived from or was affected by the New South Wales connection. One other point was emphasized by Dixon, J., on p. 375 : " If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers. As in other matters of jurisdiction or authority, Courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised. No doubt there must be some relevance to the circumstances in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection." If some connection exists, the legislature is not compelled to measure the taxation by the degree of benefit received in particular cases by the tax-payer. This affects the policy and not the validity of the legislation.

In the High Court, Derbyshire, C.J., has stated that on the wording of *Explanation* 3 to section 4 (1) of the Income-tax Act, the money " has been already subjected to tax in British India and therefore was received by foreign dividend paying company free from liability to tax in British India." It is difficult to follow the learned Chief Justice. The qualifying words were inserted in the *Explanation* to indicate that the "source" was in British India. They carry no implication of "freedom from liability to tax in British India." If, on the circumstances of this case, the dividends had been declared and paid in British India, the recipients thereof would be liable to income-tax and super-tax, notwithstanding payment of income-tax and super-tax by the company, subject of course to the benefit of section 49-B which has also been allowed to the plaintiff. The learned Judges have laid great stress upon the circumstance that the *situs* of the shares held by the plaintiff-company must, according to a long course of authority, be held to be English. This may be material in respect of any attempt to levy a tax like estate duty or legacy duty on the *corpus* of the shares. [Cf. *Blackwood* v. *The Queen*[1], *Brassard* v. *Smith*[2], *Provincial Treasurer of Alberta* v. *Kerr*[3], and *Commissioner of Stamp duties (N.S. W.)* v. *Millar*[4]]. But when the attempt is to tax income and not the *corpus* and the question to be considered is the source of that "income", it seems to us legitimate to take into account the place where the business from which the income is derived is in fact carried on and not to treat the *situs* of the shares in the eye of the law as concluding the matter.

In *London and South American Investment Trust* v. *British Tobacco Co. (Australia)*[5] the learned Judge had to deal with a very limited question, namely, the effect which a provision in an Australian enactment could have on the rights and liabilities of parties in respect of a debt arising under an English contract. On this point, the learned Judge said : " If the debt arises under an English contract and is an English debt, I do not think (1) that it is property in respect of which the Commonwealth Legislature has power to impose taxation upon the plaintiff-company or (2) that it is property, the incidence of which can be altered by the Commonwealth Legislature" (p. 119). The effect and the implications of this pronouncement have been variously interpreted. (See Ratcliffe and McGrath, " Australian Income-tax Law " at pp. 62, 176, 177, and Shaw and Barker, " The Law of Income-tax," at pp. 12, 240, 284). If its effect is only to lay down that Courts in one country will not feel bound by the revenue laws of another country or that a foreign legislature

1. (1882) 8 A.C. 82.
2. 1925 A.C. 371.
3. 1937 A.C. 710.
4. (1932) 48 C.L.R. 618.
5. (1927) 1 Ch. 107.

cannot affect the rights *inter se* of the parties to an English contract (*cf.* observation of Lord Macmillan in *Inland Revenue Commissioners* v. *National Mortgage and Agency Co. of New Zealand*[1], the case will have little bearing upon the present question. If the observations of the learned Judge are however to be relied on as bearing on the question whether an Australian Court could hold against the validity of an Australian law assessing to income-tax the dividend paid to an English share-holder by an English company deriving its revenue from the shares it held in other companies which carried on business in Australia, the decision must be read in the light of certain facts on which the learned Judge himself has laid stress. The plaintiff in that case held shares in two companies, namely, the defendant-company and the Australian Pastoral Company. The plaintiff was a trust investment company and the defendant-company too was not a trading company, but derived its revenue from its holdings of shares in other companies. The defendant-company had declared a dividend of 12 per cent. on its ordinary shares for the year ending June 30, 1922, and the amount payable to the plaintiff-company in respect thereof had in due course been paid to the plaintiff-company. The income-tax authorities in Australia assessed the plaintiff to income-tax in respect of these dividends; but in view of the difficulty of collecting the tax from the plaintiff, they purported to make the defendant-company their agent as well as the plaintiff's agent and asked it to pay the amount of the tax payable by the plaintiff and deduct it from any amounts which it might have to pay to the plaintiff. The defendant-company paid the amount and deducted it from the dividend payable to the plaintiff for the next year. The plaintiff-company claimed that it was entitled to payment of the full amount of the dividend without this deduction and contended that the Australian Legislature had no power to assess it to income-tax in respect of the dividends; it further said, "whether the legislation is *ultra vires* or not, as between itself and the defendant-company, the contract which regulates their relations is an English contract and the dividend payable to it by the defendant-company is a debt recoverable and locally situate in England and that it is no answer to the claim for the dividend that the defendant-company has been compelled by Australian law to make certain payments to the Federal Government of Australia." Dealing with the powers of the Australian Legislature, the learned Judge said that its powers of taxation "do not extend to authorize the imposition of taxation upon a person who is not resident or domiciled within the Commonwealth in respect of *property which is not situate within the Commonwealth.*" (The italics are ours). To the proposition, thus stated, no exception can be taken; the learned Judge did not purport to deal with the question of the *source* of the income at all. It is important to see how the learned Judge applied the proposition stated by him. His differentiation between dividends received from the Australian Pastoral Company and dividends received from the defendant-company is significant,in the light of the circumstance stressed by him in the course of the argument on p. 110 and repeated by him in the course of his judgment, that the defendant-company did not actually carry on business in Australia, but was a purely holding company. As we understand the judgment, it was because there was no evidence to show whether the same was the case even as regards the Australian Pastoral Company that the learned Judge said (on p. 118): "In the absence of evidence, I will assume that it (plaintiff-company) was taxable in respect of its dividends received from the Australian Pastoral Company, Ltd." Where the company in which the non-resident share-holder holds shares is not carrying on business in the taxing country, it may be possible to say that the connection between the non-resident share-holder of the first company and the profits arising out of the trade carried on by another company in which the first company held shares is too remote to justify the imposition of income-tax on that share-holder or on dividends received by him from the first company, by the State in which the trading company carried on business. On the facts of that case, the importance attached by the learned Judge to the *situs* of the plaintiff's shares is

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1. 1938 A.C. at p. 555.

understandable. In the circumstances of the present case, we are of the opinion that the "source" of the dividends paid to the plaintiff-company by the sterling companies was British Indian and that in making them liable to income-tax on that basis the Indian Legislature is not giving its law any extra-territorial operation.

Proceeding next to the appellant's alternative contention, that the extra-territorial operation, even if there was any, of the impugned provisions is no ground for holding them to be *ultra vires* the Indian Legislature, it will be convenient at the outset to advert to the distinction in this respect between sovereign legislatures and non-sovereign or subordinate legislatures. In the case of the former, the possible extra-territorial operation of a statute can furnish no argument in the Courts of that country for holding that statute to be *pro tanto* invalid. Arguments as to the territorial limits of legislative jurisdiction and to the accepted rules of international law in this behalf will be relevant only as furnishing a presumption or rule of construction against an intention to exceed the territorial jurisdiction or to violate the rules of international law, if and when the language of the statute is general. Where however the meaning and intent are plain, the presumption or rule of construction must give way. Even in the case of enactments passed by a non-sovereign legislature, the rule of presumption or construction is equally relevant, where the language of the enactment is general. But where the language is plainly extra-territorial in its operation, the question becomes one as to the authority of the legislature and the validity of the law. *Ashbury* v. *Ellis*[1], establishes that even in the case of a non-sovereign legislature, nothing turns on the question whether or not the Courts of another country will give effect to a law passed by that legislature or to decisions given under that law. So far as revenue laws are concerned, it is a well-established rule of Private International Law that the revenue laws of one country will not be enforced by the Courts of another country. Likewise, the practical difficulties that may arise in enforcing the extra-territorial provisions of a taxing statute are not by themselves a ground for invalidating them. The pertinent question is whether the particular legislation is authorized by the Constitution Act creating the subordinate legislature and defining its powers.

If the language of the Constitution Act clearly indicates that the legislative power of the subordinate legislature is subject to specified territorial limitations or if, on the other hand, the language authorizes expressly or by necessary implication extra-territorial legislation by the subordinate legislature, the position is simple enough. Where, however, the language of the Constitution Act does not contain a sufficiently clear indication one way or the other, two views are possible : one is that the language of that statute should be construed conformably to a general presumption against authorizing extra-territorial legislation, and the other view is that the statute should be construed on the basis that there is no such presumption or limitation. The one view or the other seems to have been taken according as a restricted or unrestricted view was taken of the sovereignty of the Dominions. The views that prevailed prior to 1916 have been discussed at some length in Clements' Canadian Constitution, pp. 85, *et seq.* (*See also* Jennings' Constitutional Laws of the British Empire, pp. 34 and 110, Dicey's Law of Constitution, 8th Edn., p. 99, and 9th Edn., note on p. 103). There can be little doubt that the earlier view was that subordinate legislatures should not be held "to possess any extra-territorial jurisdiction unless it is conferred upon them expressly or by necessary implication." (*See* the observations in *Macleod* v. *Attorney-General for New South Wales*[2], and *Commercial Cable Co.* v. *Attorney-General for Newfoundland*[3]). The criticisms against this view have been referred to in the judgment of Evatt, J., in *Trustees Executors and Agency Co., Ltd.* v. *Federal Commissioner of Taxation*[4]. The question was considered by a Sub-Committee of the Imperial Conference of 1926, which reported that the subject was full of obscurity and there was conflict in legal opinion as expressed in the Courts and in the writings of jurists both as to the

1. 1893 A.C. 339.
2. 1891 A.C. 455.
3. 1912 A.C. 820.
4. (1933) 49 C.L.R. 220 at 232, 233.

existence of the limitation itself and as to its extent. These doubts and difficulties were set at rest by section 3 of the Statute of Westminster, 1931. The matter was considered independently of this statute in *Croft* v. *Dunphy*[1]. Their Lordships' judgment in this case emphasised the doctrine laid down as early as *The Queen* v. *Burah*[2] and *Hodge* v. *The Queen*[3], namely, "once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the subjects enumerated in section 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign State." In *British Coal Corporation* v. *The King*[4], reference was again made to *Hodge* v. *The Queen*[3] and it was added : "In interpreting a constitutent or organic statute, that construction most beneficial to the widest possible amplitude of its powers must be adopted." Speaking of the limitation imposed "by the doctrine forbidding extra-territorial legislation," the Lord Chancellor observed that that was a "doctrine of somewhat obscure extent."

Though the Statute of Westminster is not applicable to India, the Constitution Act of 1935 has to be interpreted in the light of the discussions on this subject that had been taking place between 1926 and 1935. From this point of view, a comparison of the provisions of section 65, of the Government of India Act of 1915 with the provisions of section 99 of the present Act is instructive. The earlier provision (which reproduced the language of still earlier statutes) conferred on the Indian Legislature "power to make laws (*a*) for all persons, for all Courts and for all places and things within British India, (*b*) for all subjects of His Majesty and servants of the Crown within other parts of India, and (*c*) for all native Indian subjects of His Majesty without and beyond as well as within British India, etc., etc." The expression "places and things *within British India*" in clause (*a*), interpreted in the light of the decisions in *Blackwood* v. *The Queen*[5] and *Provincial Treasurer of Alberta* v. *Kerr*[6], would have imposed a strict territorial limitation upon the powers of the Indian Legislature. The extra-territorial power contemplated by clauses (*b*) and (*c*) is conferred in specific terms and is not assumed to be included in the power conferred by clause (*a*). In the Act of 1935, sub-section (1) of section 99 does not use the expression "things within British India," but empowers the Federal Legislature to make laws "for the whole or any part of British India" and the "topics" on which it can legislate are specified in Lists I and III of the Seventh schedule. This way of dealing with the matter is significant in the light of the observations above quoted from *Croft* v. *Dunphy*[1]. The lines on which sub-section (2) of section 99 has been framed are even more significant. In the High Court, the learned Judges have read this sub-section as *conferring* power upon the Federal Legislature to exceed the territorial limits in certain cases and they accordingly limit this power to the five cases specified in that sub-section. This seems to us, with all respect, to be a misreading of the section. Unlike clauses (*b*) and (*c*) of section 65 of the Government of India Act of 1915, sub-section (2) of section 99 is worded not as a provision "conferring power to make laws," but as a provision which *assumes* that the preceding sub-section is capable of being read as including the power to make laws even in respect of the matters specified in the five cases dealt with in sub-section (2). This is made clear both by the opening words of sub-section (2), namely, "without prejudice to the generality of the powers conferred by the preceding sub-section" and also by the tenor of the sub-section which only purports to obviate objection on the ground of extra-territorial operation. If it should be asked what necessity there was, in this view, for specifying particular cases in that sub-section, the answer would be that it was probably thought that the simple

1. 1933 A.C. 156.
2. (1878) 3 A.C. 889.
3. L.R. 9 A.C. 117.
4. 1935 A.C. 500.
5. (1882) 8 A.C. 82.
6. 1933 A.C. 710.

omission of the corresponding provisions found in the Act of 1915 might lead to the impression that the power to deal with those matters had been taken away from the Federal Legislature. Even the language of section 99 (1) involves some limitation and it might have been considered safer to avoid all risk of any difference of opinion as to its scope, so far as the topics specified in sub-section (2) were concerned. That the Federal Legislature's power of extra-territorial legislation is not limited to the cases specified in clauses (*a*) to (*e*) of sub-section (2) of section 99 appears clearly from entry No. 23 of List I of the Seventh Schedule, relating to "fishing and fisheries beyond territorial waters." It would not be right to derive the power to legislate on this topic merely from the reference to it in the List, because the purpose of the Lists was not to create or confer powers, but only to distribute between the Federal and the Provincial Legislatures the powers which had been conferred by sections 99 and 100 of the Act. Nor can the power be inferred from the doctrine of accessory or necessary powers, for, it cannot be said that the other powers conferred on the Federal Legislature cannot be made effective without the right to legislate in respect of fisheries beyond territorial waters. The power so to legislate was obviously understood to have been conferred by sub-section (1) of section 99.

The only limitation that now exists is that which is involved in the connection implicit in the expression "laws for British India." The words of Evatt, J., in *Trustees Executors and Agency Co., Ltd.* v. *Federal Commissioner of Taxation*[1], where he was dealing with the position of the Australian legislature independently of section 3 of the Statute of Westminster, are, in our opinion, equally true of the legal position in India, whatever the differences between the two countries in political conditions may be. The learned Judge said : "The Constitution requires that it must be possible to predicate of every valid law that it is for the peace, order and good government of the Dominion with respect to a granted subject, *e.g.*, customs, taxation, external affairs. In such cases, the presence of non-territorial elements in the challenged law has to be considered upon a slightly different footing and those affirming its validity have to show not only that the Dominion has some real concern or interest in the matter, thing or circumstance dealt with by the legislation, but that the concern or interest is of such a nature that the challenged law is truly one with respect to an enumerated subject-matter." In our judgment therefore the extent, if any, of extra-territorial operation which is to be found in the impugned provisions is within the legislative powers given to the Indian Legislature by the Constitution Act.

The appeal is accordingly allowed. The case is remitted to the High Court at Calcutta with a declaration that for the decree of the High Court, dated April 9, 1943, there shall be substituted a decree dismissing the action with costs in the High Court. The respondent will pay the costs of the appellant here.

V.S. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

M. Sheik Dawood Rowther .. *Petitioner**

*v.*

The South Indian Railway Company, Ltd., Trichinopoly and another .. *Respondents*.

*Contract—Railway—Contract for carriage of goods—Charging by mistake of concession rate which had been cancelled—Right of railway to collect before delivery the amount of the difference in rates—Condition on the back of forwarding note (not read by consignor) enabling the railway to collect the amount—How far binding on consignor.*

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1. (1933) 49 C.L.R. at p. 236.

*C.R.P. No. 135 of 1943. 7th March, 1944.

The forwarding note in the prescribed form signed by the consignor and addressed to the South Indian Railway Company stated "Please receive the undermentioned goods, and forward by goods train to—on—Railway as consigned below, and subject to the following conditions which are accepted by me namely . . . . " The consignor was required to sign a statement "I do hereby certify that I have satisfied myself that the description, marks, value and weight or quantity of goods consigned by me have been correctly entered on this forwarding note and I agree to be bound by the conditions printed above and at the back of this "forwarding note; and on the railway receipt granted for these goods". On the back of the forwarding note were conditions, No. 8 of which read as follows:—

"Goods booked to stations on the South Indian Railway or Railways worked by the South Indian Railway are carried subject to the rules and conditions printed from time to time in the Railway Company's Goods Tariff, and goods booked to or over a foreign railway are subject to the rules and regulations and to wharfage and other charges in force on such railway".

Rule 15 of the rules published in the Goods Tariff of the South Indian Railway states that the weight, description and classification of goods, and quotation of rates as given in the railway receipt and forwarding note are merely inserted for the purpose of estimating the railway charges and the railway reserves the right of re-measurement re-weighment, re-classification and re-calculation of rates, terminals and other charges and correction of "any other" errors at the place of destination and of collecting any amount that may have been omitted or undercharged. The rules of the Ceylon Railway contain similar provisions.

So where in respect of a consignment of some waggons of rice to Galle in Ceylon consigned from stations on the South Indian Railway, by mistake a concession rate which had been cancelled was charged, the consignor must be deemed to have had notice of the cancellation of the concession rate and the reimposition of the ordinary rate. The railway had under the rules and conditions in the contract contained in the forwarding note a right to collect the difference between the concession rate and the ordinary rate and where the consignee was compelled to pay the difference before delivery of the goods a suit for the refund of the amount is not maintainable. Failure of the consignor to read the conditions on the back of the forwarding note would not help him. Further the authority of the booking clerk is restricted and he cannot lawfully accept a rate outside the tariff.

*Parker* v. *South Eastern Railway Co.,* (1877) 2 C.P. 416 applied *Bhagwati Prasad* v. *B. B. and C. I. Railway,* I.L.R. 1940 All. 212 and *Manal Krishna Nayak and Sons* v. *South Indian Railway Co. Ltd.,* (1942) 2 M.L.J. 348 approved.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Trichinopoly in S.C.S. No. 64 of 1942.

*M. S. Venkatarama Aiyar* for Petitioner.

*S. S. Ramachandra Aiyar* for Respondents.

The Judgment of the Court was delivered by

*The Chief Justice.*—For some time before the 1st July, 1941—the exact period has not been disclosed to the Court—the South Indian Railway Company, Ltd., booked consignments of rice from stations on the company's line to Galle in Ceylon at a rate less than it had previously charged. The new rate was known as the concession rate and was the only rate ruling in the month of June, 1941. On the 15th of that month the company cancelled the concession rate and reverted to the old rate as from the 1st July, 1941. The change was notified in the Local Rate Advice No. 6 of 1941, which was circulated to all stations on the company's system. In July, 1941, the petitioner wished to consign two waggons of rice from Tanjore to Galle and five waggons of this commodity from Adhirampatnam to the same destination. Rice so consigned is carried over the South Indian Railway system to Dhanushkodi where it is shipped to Thalamannar and then placed on the Ceylon Government Railway. The booking clerks at Tanjore and at Adhirampatnam accepted these consignments. Both of them forgot that the concession rate had been cancelled and consequently the consignments were accepted at the concession rate. The evidence of the station master at Adhirampatnam is to the effect that a statement of the new rates was hung up in the station premises for the information of the public. The petitioner's consignment from that station was accepted on the 11th July, 1941. The consignment from Tanjore was accepted on the 1st

July, 1941. When the goods arrived at Galle the mistake had been discovered and the Ceylon Government Railway refused to deliver the goods to the consignee unless the difference between the concession rate and the ordinary rate was paid. The petitioner was compelled to comply with this demand, which meant the disbursement of an additional sum of Rs. 766-10-9. As he considered that the further demand was unlawful, he filed a suit in the Court of the Subordinate Judge of Trichinopoly to recover the amount. The suit was numbered S.C.S. No. 64 of 1942. The Subordinate Judge held that by reason of clause 5 of the conditions set out on the face of the forwarding note the petitioner was not entitled to recover and accordingly dismissed his suit. The petitioner has applied under section 25 of the Provincial Small Cause Courts Act, 1887 for revision of the decree passed by the Subordinate Judge. The South Indian Railway Company, Ltd., and the Ceylon Government Railway were both made defendants in the suit and they are the respondents in this petition. They contend that the decision of the Subordinate Judge is right, but they say that in any event the petitioner was precluded from suing by reason of condition No. 8 printed on the back of the forwarding note.

Condition No. 5 on the face of the document reads as follows:—

> "I agree that the Railway Company have the right of re-measurement, re-weighment, re-classification and re-calculation of rates, terminals and other charges at the place of destination, and of collecting before the goods are delivered any amount that may have been omitted or under-charged."

Obviously the demand for the additional amount was not based on remeasurement or re-weighment. The respondents claim that it is based on a re-classification and re-calculation of rates. Numerous cases have been referred to in the course of the arguments on this question but we do not consider it necessary to discuss them. In our opinion this is clearly not a case of re-classification or of re-calculation of rates. There was only one class of rice and the arithmetic was correct. The mistake was in charging a rate which had been cancelled instead of charging the rate which had been prescribed, and the only rate which could be lawfully charged. Therefore if the case fell to be decided on condition No. 5 of the conditions on the face of the forwarding note, the consignor's case would be well-founded; but we consider that the Railways are entitled to judgment by reason of condition No. 8 of the conditions printed on the reverse of the document.

There is a prescribed form of forwarding note. It is addressed to the South Indian Railway Company, Ltd., and commences with these words:—

> "Please receive the undermentioned goods, and forward by goods train to. . . . . . . on . . . . . Railway as consigned below, and subject to the following conditions, which are accepted by me, namely . . . . "

Then are set out six conditions. Below the conditions are columns for the insertion by the consignor of the particulars required by the Railway. Having inserted the particulars the consignor is required to sign this statement,

> "I do hereby certify that I have satisfied myself that the description, marks, value and weight or quantity of goods consigned by me have been correctly entered in this forwarding note, and I agree to be bound by the conditions printed above and at the back of this forwarding note; and on the railway receipt granted for these goods".

The petitioner filled in the required particulars and appended his signature as required.

On the back of the forwarding note there are 11 conditions, No. 8 of which reads as follows:—

> "Goods booked to stations on the South Indian Railway or Railways worked by the South Indian Railway are carried subject to the rules and conditions printed from time to time in the railway company's Goods Tariff, and goods booked to or over a foreign railway are subject to the rules and regulations and to wharfage and other charges in force on such railway."

Sub-section (1) of section 55 of the Indian Railways Act, 1890, states that if a person fails to pay on demand made by or on behalf of a railway administration a rate, terminal or other charge due from him in respect of animals or goods, it may detain them. Sub-section (5) says that, notwithstanding anything in the previous sub-sections, the railway administration may recover by suit a rate, terminal or other charge or balance thereof.

Rule 15 of the rules published in the Goods Tariff of the South Indian Railway states that the weight, description and classification of goods, and quotation of rates as given in the railway receipt and forwarding note are merely inserted for the purpose of estimating the railway charges and the railway reserves the right of re-measurement, re-weighment, re-classification and re-calculation of rates, terminals and other charges and correction of "any other" errors at the place of destination and of collecting any amount that may have been omitted or undercharged. No admission is conveyed by a railway receipt that the weight as shown therein has been received or that the description of goods as furnished by the consignor is correct. The rules of the Ceylon Government Railway contain similar provisions.

Under the contract entered into between the petitioner and the South Indian Railway Company, Ltd., the petitioner agreed to pay the rate according to the company's goods tariff. By mistake the concession rate which had been cancelled was charged, but the contract provided for the rectification of the mistake. The petitioner must be deemed to have had notice of the cancellation of the concession rate and the reimposition of the ordinary rate. The alteration in the rate had been notified in the ordinary way and a copy of the order revising the rate had been posted at the Adhirampatnam station. Inasmuch as the petitioner accepted the rate set forth in the Tariff (which means the amended tariff) and agreed to the rectification of any mistake he cannot object to the additional charge. Failure to read the conditions on the back of the forwarding note would not help him. The principle of *Parker* v. *South Eastern Railway Co.*[1] would apply here. It has also to be remembered that the authority of a booking clerk to enter into such contracts is restricted. He cannot lawfully accept a consignment at a rate outside the tariff. Further the officials of the Ceylon Government Railway also had the right of refusing to deliver the goods to the consignee until the additional payment had been made. In these circumstances we hold that the petitioner's suit does not lie. We may add that support for this opinion is to be found in the decisions of the Allahabad High Court in *Bhagwati Prasad* v. *B. B. and C. I. Railway*[2] and the judgment of Somayya, J., in *Manal Krishna Nayak and Sons* v. *South Indian Railway Co., Ltd.*[3]

The petition will be dismissed with costs.

K. S. ——— *Petition dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL.

Chigurupalli Krishna Rao, minor and another .. *Appellants**

*v.*

The Manager, Bhaskararaopuram Co-operative Society, represented by its manager, Bellamoodi Sankara Rao .. *Respondent.*

*Limitation Act (IX of* 1908), *Article* 181—*Award under the Co-operative Societies Act (II of* 1912)—*Enforcement—Sale and confirmation—Application for delivery of possession after three years from the date of confirmation—Barred by limitation.*

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1. (1877) 2 C.P. 416.
2. I.L.R. (1940) All. 212.
3. (1942) 2 M.L.J. 348.

*A.A.A.O. No. 116 of 1943. 16th March, 1944.

In enforcement of an award under the Co-operative Societies Act, the appellant's property was brought to sale and purchased by the decree-holder and the sale was duly confirmed. An execution application in the Civil Court was filed by the purchaser after more than three years from the date of confirmation of the sale. On the question whether the application is barred by limitation,

*Held,* that the right to apply in execution accrued on the date of the confirmation of the sale and not from the date when the attempt of the purchaser to enter on the land was resisted. The application for delivery of possession had to be made within three years from the date of confirmation of the sale and therefore the present application was out of date in the circumstances of the case.

*Sambasiva Mudaliar* v. *Panchanatha Pillai,* (1907) 17 M.L.J. 441: I.L.R. 31 Mad. 24 explained.

Appeal against the order of the District Court of Vizagapatam dated 6th April, 1943, and made in Ap. No. 326 of 1943 preferred against the order of the Court of the District Munsif of Chicacole dated 14th July, 1941, and made in O.E.P. No. 364 of 1940 in Awards Nos. 245, 943 and 264 of 1931-32, Co-operative Society, Bhaskararaopuram.

*V. K. Thiruvenkatachari* for Appellants.

*P. V. Rajamannar* and *K. Subba Rao* for Respondent.

The Court delivered the following

JUDGMENT.—The question raised in this appeal is one of limitation. Three awards were obtained against the appellants under the Co-operative Societies Act in 1931. Rule 15 clause 7 of the rules made under the Co-operative Societies Act states that a decision or award shall be enforced in any of three ways. In the present case, the award was enforced under rule 15, clause 7, *i.e.,* by an application to the Registrar. On the 27th November, 1934, in enforcement of the award under the provisions of rule 22 the appellants' property was brought to sale and purchased by the decree-holder and the sale was confirmed on the 21st January, 1935. The execution petition out of which this appeal arises, E.P. No. 364 of 1940 was presented in the Civil Court under the provisions of rule 22, clause 12 on 22nd July, 1940. The learned District Munsif held that the application was out of time and repelled the contention put forward for the purchaser that the starting point for limitation was the date on which his attempt to enter on the land was resisted. On appeal, the District Judge of Vizagapatam reversed the decision of the District Munsif. The District Judge referred to the case of *Sambasiva Mudaliar* v. *Panchanatha Pillai,*[1] and holding that Art. 181 applied and that the right to apply accrued when the purchaser of the land was resisted, found that the application was in time. Section 40 of the Revenue Recovery Act is not distinguishable in terms from rule 22, clause 12 of the rules made under the Co-operative Societies Act, and in *Sambasiva Mudaliar* v. *Panchanatha-Pillai,*[1] the question was with regard to the article of the limitation applicable where an application had been made for delivery of possession under section 40 of the Revenue Recovery Act. The learned District Judge, however, seems to have overlooked the fact that the result in *Sambasiva Mudaliar* v. *Panchanatha Pillai*[1] was that the application which had been put in more than three years after the date of confirmation of sale was dismissed. The District Judge in his judgment has set out the whole of the first two paragraphs of the head-note to *Sambasiva Mudaliar* v. *Panchanatha Pillai*[1] and between the two paragraphs he has interpolated an observation of his own to the effect that the right to apply accrues when the purchaser of the land is resisted and prevented from obtaining possession of the land purchased. It does not seem to me that in *Sambasiva Mudaliar* v. *Panchanatha Pillai*[1], there is any warrant for this observation. As the learned District Munsif points out, it would be a remarkable position if the purchaser was entitled to come to Court at any time he

1. (1907) 17 M.L.J. 441: I.L.R. 31 Mad. 24.

pleases after the date of confirmation of sale, stating that an attempt made by him to gain possession has been resisted, and claiming that he was entitled to a period of three years limitation from the date of the resistance. In my opinion the right to apply accrued on the date of the confirmation of the sale and the application for delivery of possession had to be made within three years from that date. That being so, the appeal must be allowed with the appellants' costs throughout.

Leave to appeal is refused.

K. C. ——— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

S. C. Puttappaji .. *Appellant**

*v.*

Dodda Mallappa and others .. *Respondents.*

Res judicata—*Execution application filed out of time—Judgment-debtor* ex parte—*Order of Court allowing execution—Objection at a later stage that application was out of time—Objection could not be raised—Decision at one stage of execution may operate as* res judicata *at a later stage.*

If an order prejudicial to the judgment-debtor is passed then he is barred from raising any point at a later stage of the proceedings decided expressly or impliedly by that order.

An execution petition was filed out of time. Notice went to respondents and other judgment-debtors but they remained *ex parte* and an order was passed, "Proclaim and sell". At a later stage of the execution proceedings an objection of limitation was taken. On the question whether such an objection can be raised at a later stage in the execution proceedings,

*Held,* that when the adverse order was passed against the respondent he had a right of appeal under section 47, Civil Procedure Code, but as he did not exercise that right he was barred from disputing the correctness of the order at a subsequent stage.

Appeal against the Appellate Order of the District Court of Coimbatore dated 17th September, 1940, and made in A.S. No. 32 of 1940, preferred against the order of the Court of the District Munsif of Kollegal dated 27th October, 1939, and made in E.P.R. No. 286 of 1936 in O.S. No. 86 of 1920.

*M. Krishna Bharathi and S. Ramachandra Aiyar* for Appellant.

*K. K. Gangadhara Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—Execution Petition No. 286 of 1936 was filed out of time; because the prior execution petition—which was unnumbered—was returned for supplying defects and no final order was passed on it. Notice went to the respondent and to the other judgment-debtors; but they did not appear and remained *ex parte.* In due course, on 10th October, 1938, the Court passed the order "Proclaim and sell". Because of the filing of a petition under Act IV of 1938, execution was stayed; and at a later stage an objection of limitation was taken, which was upheld. The appellant appealed; and the lower appellate Court confirmed the order of the first Court.

There can be no doubt, not only that an order passed in one execution petition will operate as *res judicata* if a similar point arises for decision in a later execution petition, but a decision made at one stage of execution operates as *res judicata* at a later stage. If an order to execute is passed in an execution petition, then by implication the Court has decided (1) that the petitioner has a right to execute; (2) that the judgment-debtor is liable to satisfy the decree; (3) that the decree is executable; and (4) that it is not barred by limitation. The result is that at no subsequent stage after an order to execute has been passed is

*A.A.A. O. No. 172 of 1941. 25th February, 1944.

it open to the judgment-debtor to dispute the correctness of these four implied decisions. On the authority of *Dewan Syed Aley Rasul* v. *Seth Balkishan*[1], it is argued that a judgment-debtor can raise objections at any stage and is not barred by *res judicata* because he did not raise them at the earliest possible occasion. Whatever may be the law in Allahabad, that is not the law in Madras; and no Madras case has been shown to me which departs from the rule that if an order, prejudicial to the judgment-debtor is passed, then he is barred from raising any point at a later stage of the proceedings decided expressly or impliedly by that order. In *Venkataranga Reddi* v. *Chinna Seethamma*[2], Wadsworth and Patanjali Sastri, JJ., held that even though an execution petition be finally dismissed, an order in it that the decree should be executed would operate as *res judicata* in subsequent proceedings. That would certainly not be the case if the judgment-debtor were not bound to raise his defences on the first appropriate occasion.

The law on the subject as far as this High Court is concerned is clear and consistent; and the only reason urged for departing from it is that section 3 of the Limitation Act makes it obligatory upon the Court to dismiss an application made after the period of limitation, even though limitation has not been set up as a defence. The weak point of this argument seems to be that when the Court ordered the property to be sold, it decided—rightly or wrongly—that the application was not barred by limitation and so had no power to pass any subsequent orders inconsistent with its earlier decision. When the Court passed an order adverse to the respondent that the property should be sold, he had a right of appeal under section 47, and as he did not exercise that right he is barred from disputing the correctness of the order at a subsequent stage.

The appeal is therefore allowed and the execution petition remanded to the executing Court for further proceedings. Costs in all three Courts will abide the result.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFREAD HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Messrs. A. Jainulabdeen Sahib, Madras .. *Appellant**

*v.*

The Commissioner of Income-tax Madras .. *Respondent.*

*Indian Income-tax Act (XI of* 1922), *as amended by Income-tax (Amendment) Act VII of* 1939, *section* 41—*Order passed upon the terms agreed to by the parties—Not an order of Court.*

An order passed on terms agreed upon will still remain an agreement between the parties and not an order of the Court within the contemplation of section 41 of the Income-tax Act. The fact that the law requires the Court to give leave to a guardian to enter into a compromise on behalf of the minor does not alter the position.

*Keshar Deo Chamria* v. *Commissioner of Income-tax, Bengal,* (1939) 2 M.L.J. 893: I.L.R. (1939) 2 Cal. 300 (P.C.) followed.

Case referred to the High Court by the Income-tax Appellate Tribunal Bombay under section 66 (1) of the Income-tax Act, 1922, (Act XI of 1922) as amended by section 92 of the Income-tax Act (Amendment) Act 1939 (Act VII of 1939) in Appln. No. 66, R.A. No. 9—Madras of 1943-44 on its file for decision on the following question of law, *viz.*:—

"1. Whether in the circumstances of the case, the managers of the business run in the name of Messrs. A. Jainalabdeen Sahib and Sons can be said to be appointed by or under the order of the Court within the meaning of section 41 (1) of the Indian Income-tax Act, 1922.

1. A.I.R. 1937 All. 446. 2. (1941) 1 M.L.J. 270.

* Case Referred No. 41 of 1943. 17th March, 1944.

2. If the answer to question No. 1 is in the affirmative, whether the manager was entitled to receive the income on behalf of the association of persons, namely, the two widows and the minor son of the late Jainalabdeen Sahib''.

*P. R. Srinivasan* and *D. Narasaraju* for the assessee.

*K. V. Sesha Ayyangar* for Respondent.

The Judgment of the Court was delivered by

*The Chief Justice.*—In view of the decision of the Privy Council in *Keshar Deo Chamria* v. *Commissioner of Income-tax, Bengal*,[1] the answer to the first question must be in the negative. Their Lordships there held that an order of the Court appointing managers of an estate, the order being made in accordance with an agreement entered into between the parties, did not bring the case within the section. In the present case the order appointing M. Gulam Dastagir Sahib and Hajee K. Gulam Khader Sahib as managing agents was passed at the request of the parties. Mr. P. R. Srinivasan has suggested that this case is distinguishable from *Keshar Deo Chamria* v. *Commissioner of Income-tax, Bengal*,[1] because here one of the parties is a minor. The fact that the law requires the Court to give leave to a guardian to enter into a compromise on behalf of a minor does not alter the position. All that the Court does in such a case is to see that the proposed compromise is in the interests of the minor. An order passed on the terms agreed upon will still remain an agreement between the parties and not an order of the Court within the contemplation of section 41.

As we have answered the first question in the negative, the second question does not arise.

The Commissioner of Income-tax will have his costs, Rs. 250.

V. P. S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Commissioner of Income-tax, Madras .. *Applicant**

*v.*

Sri K.N.K.V.R.V. Venkatachalam Chettiar .. *Respondent.*

*Indian Income-tax Act (XI of 1922), section 41 (1) first proviso—Account year, 1940-41—Assessment year 1941-42—Amendment of section 41 coming into force 26th November, 1941—Amended section does not apply as the assessment was before the amendment came into force.*

Where the assessee was the executor of the will of one *K* who bequeathed part of her properties to her husband and the balance to her son's son who was not born at the time of her death, even assuming that the assessee was functioning as a trustee for the unborn grandson and not merely as the executor of the will, he would still not be within section 41 of the Income-tax Act as amended, as the amendment came into force on 26th November, 1941, which was after the assessment.

Case referred to the High Court of Judicature at Madras by the Income-tax Appellate Tribunal, Calcutta Bench under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) in the case of Sri K.N.K.V.R.V. Venkatachalam Chettiar, Executor to the Estate of Kannamai Achi, Karaikudi in Application No. 66 R.A. 8 Madras of 1943-1944 (Assessment year, 1940-1941) on its file for decision on the following question of law, *viz.*:—

''Whether in the circumstances of this case the income received by the executor to the estate of Kannammai Achi was assessable at the maximum rate under section 41 (1) first proviso of the Indian Income-tax Act of 1922''.

*K. V. Sesha Aiyangar* for Applicant.

*P. R. Srinivasan* for Respondent.

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1. (1939) 2 M.L.J. 893: I.L.R. (1939) 2 Cal. 300 (P.C.).

* Case Referred No. 35 of 1943. 25th February, 1944.

The Judgment of the Court was delivered by

*The Chief Justice.*—Facts which have been disclosed in this Court make it clear that the assessment in this case has proceeded on a wrong basis. The assessment was made on the assessee under the first proviso to section 41 (1) of the Income-tax Act. The account year is the year 1940-1941 and the assessment year 1941-1942. The section was amended by Act XXIII of 1941 and the amendment came into force on the 26th November, 1941, which was after the assessment. Consequently section 41 did not apply which means that the Income-tax Officer had no power to levy the maximum rate.

The assessee is the executor of the will of one Kannamai Achi, who died on the 5th August, 1940, leaving a will dated the 25th April, 1940. She was survived by her husband and her son. She had decided not to leave any part of her property to her son. Out of a sum of Rs. 1,17,700 belonging to her she left Rs. 50,000 to her husband. She left the balance to her son's son, natural or adopted. At the time of her death, her son had no issue and had made no adoption. It has been accepted that by reason of the Hindu Transfers and Bequests Act (Madras Act I of 1914) and the Hindu Disposition of Property Act (Imperial Act XV of 1916) the bequest to an unborn grandson is good and it has also been accepted that if the son adopted a son after the testator's death he would be a lawful beneficiary.

Before its amendment section 41 did not apply to a testamentary trust. The amendment was made in order to bring such trusts within the purview of the section. Before the words were "any trustee or trustees appointed under a duly executed trust deed".

Now the words are

> "any trustee or trustees appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise".

Assuming that the assessee is here to be regarded as functioning as a trustee for the unborn grandson and not merely as the executor of the will, he would still not be within the section. When the order of assessment was passed, the amendment had not come into force and the Income-tax Officer overlooked this fact as did the assessee. We are told that the mistake was discovered when the Commissioner was applying to the Income-tax Appellate Tribunal for an order of reference to this Court. There is certainly no mention of the matter in any part of the record before us.

The question referred is whether in the circumstances of this case the income received by the executor to the estate of Kannamai Achi was assessable at the maximum rate under section 41 (1) first proviso of the Indian Income-tax Act, 1922, and it must be answered in this way. The section does not apply to the present assessment and therefore the assessee is not liable to be assessed at the maximum rate.

We consider that both sides are to blame for the present position and consequently we make no order as to costs.

V. P. S. ——— *Reference answered.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Narukulla Adinarayana (died) and others .. *Petitioners**

*v.*

Narukulla Rattamma and another .. *Respondents.*

*Court Fees Act (VII of 1870), section 7 (IV) (A)—Gift deed—Sham, nominal and inoperative—Suit for declaration of title by owner of property—Section 7 (IV) (A) inapplicable.*

*C.R.P. No. 2185 of 1941 and C.M.P. Nos. 2424 and 4035 of 1942. 8th February, 1944.

If a gift deed, being a sham, nominal and inoperative transaction has no legal effect, section 7 (*iv*)-*A* of the Court Fees Act which deals with a suit for cancellation of a document securing money or other property cannot have any application and court fee would not fall to be paid thereunder for a suit for declaration of title by the owner of the property.

Case-law discussed.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Ellore, dated 20th August, 1941, and made in Check Slip No. 737-5-I of the Court-Fee Examiner O.S. No. 66 of 1940, etc.

*V. S. Narasimhachar* for Petitioners.

*P. Somasundaram* and *The Government Pleader* (*K. Kuttikrishna Menon*) for Respondents.

The Court delivered the following

JUDGMENT.—*C.R.P. No.* 2185 *of* 1941.—The allegation in the plaint with which we are now concerned is that the deceased first petitioner executed a sham and nominal gift deed for the purpose of screening his property from creditors. He was subsequently dispossessed of this property and he therefore sought for a declaration that he was still the owner of the property, despite the execution of the gift deed and for possession. The question is whether the prayers in his plaint are to be looked upon as being merely for a declaration and consequential relief or whether the suit is to be regarded in substance as one for the cancellation of the gift deed. If the latter be the case, as the lower court has found, then the petitioners will have to pay a very much higher court-fee than that already paid.

It is not denied that if, as the plaintiff alleged, the transaction was a sham and nominal one, there was no conveyance of property from the first petitioner to his first wife, the donee under the deed. There are many decisions of this Court to the effect that if there has been no conveyance and the transaction in which the deed was executed was a sham and nominal one, there is no need to set aside the transaction or the deed. In *Swaminatha Aiyer* v. *Rukmini Ammal*[1], for example, the question arose whether it was necessary to have a transaction set aside under section 53 of the Transfer of Property Act where the allegations were that it was a sham and nominal transaction intended to defraud creditors. It was held that it was not. *Pethaperumal Chetti* v. *Muniandi Servai*[2], is a decision of the Privy Council in which the question whether a certain sale was sham and nominal or not had to be considered. The parties to the proceedings traced their title to the original parties to the sale deed. Their Lordships said "that the conveyance of the 11th June, 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecesary for him to have it set aside as a preliminary to his obtaining the relief he claims." In *Subraya Chetti* v. *Nagappa Chetti*[3], Venkatasubba Rao, J., held that a deed which is sham and nominal has not to be set aside. I do not think it necessary to consider *Abdulla* v. *Subramanian Pattar*[4], as it is perhaps doubtful whether that decision is any longer good law after the Full Bench decision in *Ramaswami v. Rangachar*[5]. If the gift deed in question, being a sham, nominal and inoperative instrument, has no legal effect, it is difficult to see how section 7 (*iv*) (A) which deals with a suit for cancellation of a document securing money or other property, can have any application.

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1. A.I.R. 1920 Mad. 88.
2. (1908) 18 M.L.J. 277: L.R. 35 I.A. 98: I.L.R. 35 Cal. 551 (P.C.).
3. (1927) 53 M.L.J. 311.
4. (1936) 71 M.L.J. 383.
5. (1940) 1 M.L.J. 32: I.L.R. 1940 Mad. 259 (F.B.).

The learned Government Pleader relies on a general summary of the law relating to section 7 (*iv*) (A) of the Court Fees Act found in a judgment of Wadsworth, J., in *Vellayya* v. *Ramaswami*[1]. The learned Judge draws a distinction between those classes of cases in which the plaintiff was *eo nomine* a party to a decree or document and those in which he is not. He says with regard to the former that "when the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void in *toto*". So far, the correctnes of this statement is not disputed; but the learned Judge goes on to say "and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for a declaration." That would perhaps be so in all cases of decrees and it certainly would be so with regard to voidable deeds; but there seems to be an exception to the general rule, for the reasons given in the preceding paragraph, with regard to deeds which are intended to be inoperative. The learned Judge however held that the case which he was considering came in the other class of cases in which the deed is between third parties. He held that in such circumstances, it was not necessary to have the document set aside and it could not, in fact, be set aside. The learned Government Pleader then referred to a decision in *Singarappa* v. *Talari Sanjivappa*[2]. There, the deed with which the learned Judges were concerned, was alleged to be a sham sale deed in favour of the defendants; and the question was one of limitation. The learned Judges held that the suit had to be brought within three years from the date when the plaintiff apprehended that the defendants had set up title under the instrument; but that was a case in which the plaintiff specifically asked to have the deed cancelled; and the learned Judges did not consider whether it was necsssary for the plaintiff to pray for the cancellation of the document. Moreover, the matter did not arise, because the suit was held to be within time. If a plaintiff sues for a declaration, he would have to pay Court fees under section 7 (*iv*) (A) of the Court Fees Act, whether it was necessary to have the deed cancelled or not. In *Unni* v. *Kunchi Ammal*[3], another case relied on by the learned Government Pleader remarks are found which really favour the petitioners. The learned Judges say,

> "There can be no doubt that when a person seeks to recover property against an instrument executed by himself or one under whom he claims he must first obtain the cancellation of the instrument. . . . . . .Although similar relief might be given in cases where the deed was on the face of it void, on the principle of removing a cloud from the plaintiff's title and preventing further litigation, we do not think that relief by way of cancellation of the deed was absolutely necessary, except in cases where the deed was sought to be avoided on account of fraud or other such ground".

The learned Judges were in fact dealing with a case between third parties. The argument of the learned Government Pleader is that the plaintiff is seeking to establish his title and is met by this document which negatives his title, that in order to establish his title he has to get rid of the effect of this document and that it is therefore necessary to pray for the cancellation of the document. Where however he asserts that the document was intended to be inoperative and was not intended to be anything more than a scrap of paper, it has no legal effect and therefore does not stand in the way of his getting a declaration of his title.

The lower Court referred to *Petheperumal Chetti* v. *Muniandi Servai*[4], but distinguished it on the ground that it was a case in which the plaintiff was not

1. (1939) 2 M.L.J. 400: I.L.R. (1940) Mad. 73.
2. (1904) 15 M.L.J. 228: I.L.R. 28 Mad. 349.
3. (1890) I.L.R. 14 Mad. 26.
4. (1908) 18 M.L.J. 277: L.R. 35 I.A. 98: I.L.R. 35 Cal. 551 (P.C.).

a party. Although that is true, he was claiming under a party and would therefore be in the same position as the party himself.

The petition is therefore allowed with costs against the Government.

K. C. —— *Petition allowed.*

## [THE FEDERAL COURT OF INDIA.]

[On appeal from the Judicial Commissioner's Court, North-West Frontier Province].

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

Q. Qudratullah .. *Appellant**

*v.*

The N. W. F. Province .. *Respondent.*

*Government of India Act (1935), section 240—Dismissal of a Sub-Inspector of Police by the Deputy Inspector-General of Police—Legality—Reasonable opportunity to show cause against proposed dismissal—Federal Court practice—Interference with unanimous findings of fact of Courts below.*

A Foot Constable appointed in 1922 was promoted as Assistant Sub-Inspector in 1933 and as Sub-Inspector in 1936, in which post he was confirmed in 1937. In 1941 he was dismissed from the service by the Deputy Inspector-General of Police after an enquiry was carried out into his conduct both by an Inspector of Police and by a Superintendent of Police. On a contention that there was no legal dismissal and that no reasonable opportunity was given to him to show cause against his proposed dismissal,

*Held*, that the Sub-Inspector was duly appointed to and confirmed in his post as Sub-Inspector by the Deputy Inspector-General of Police and hence the Deputy Inspector-General of Police was an authority who could in the circumstances legally dismiss him. He has therefore no cause of action under sub-sections (1) and (2) of section 240, of the Constitution Act. As an enquiry was carried out into the conduct of the Sub-Inspector both by an Inspector of Police and by a Superindendent of Police before it was proposed to dismiss him, he had been given a reasonable opportunity of showing cause against his proposed dismissal.

The Federal Court is normally very slow to come to a conclusion of fact contrary to the unanimous findings of Courts from which appeals come to it.

*K. K. Raizada*, instructed by *Tarachand Brijmohanlal*, Agent, for Appellant.

*Malik Khuda Baksh*, Advocate-General of N. W. F. Province (*with Tarachand Mathur*), instructed by *Ganpat Rai*, Agent, for Respondent.

The Judgment of the Court was delivered by

*Spens, C. J.*—Section 240 of the Government of India Act, 1935, provides as follows :

"240. (1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him . . ."

The appellant in this case, Qudratullah Khan, was appointed a Foot Constable in the Police at Peshawar on the 9th of January, 1922. On the 1st of March, 1933, he was promoted as Assistant Sub-Inspector. On the 10th of May, 1934, he was confirmed in his rank as Assistant Sub-Inspector. On the 25th of March, 1936, he was promoted to the rank of Sub-Inspector and he was confirmed in that appointment on the 25th of March, 1937. On the 8th of March, 1941, he was dismissed from the service by the Deputy Inspector-General of Police.

Basing his claim on the provisions of the above section of the Constitution Act and on the decision of this Court in *Suraj Narain Anand* v. *The North-West Frontier Province*[1], the appellant commenced on the 28th July, 1942, an action in the Court

* Case No. 34 of 1943. 17th April, 1944.

1. (1941) F.L.J. 22 (F.C.) : (1941) F. C. R. 37.

of the Senior Subordinate Judge, Peshawar, against the Government of the North-West Frontier Province. The appellant claimed a declaration that he had not been legally dismissed from the service on the ground that he had been dismissed by an authority subordinate to that by which he claimed to have been appointed, namely the Inspector-General of Police. He also added a further claim based on sub-section (3) of section 240 of the Constitution Act that he had been dismissed without being given a reasonable opportunity of showing cause against the action proposed to be taken against him. His action was on the 20th February, 1943, dismissed in the Court of the Senior Subordinate Judge, and an appeal to the Court of the Judicial Commissioner at Peshawar suffered the same fate on the 21st June, 1943. A certificate under section 205 of the Constitution Act was however granted by the Judicial Commissioner's Court. Hence the present appeal to this Court. Before us the same two points under section 240 of the Constitution Act were taken and argued on behalf of the appellant.

So far as the first point is concerned, the matter turns wholly upon a question of fact as to the authority by whom the appellant was appointed to the post of Sub-Inspector. By the year 1935, the Deputy Inspector-General had been given powers under rules duly made under the Indian Police Act (Act No. V of 1861) and sanctioned by the Provincial Government to appoint and dismiss Sub-Inspectors. Both the Courts below were satisfied on the evidence of the official witnesses and documents produced by them that the appellant had been appointed in March, 1936 to and confirmed in 1937 in his post as Sub-Inspector by the Deputy Inspector-General and that therefore the Deputy Inspector-General was an authority by whom he could be legally dismissed. It was submitted to us that the record of the case as put before this Court did not contain proper evidence that the appointment had been made by the Deputy Inspector-General of Police and it was suggested that accordingly this Court should come to a contrary conclusion of fact to that on which both the Courts below were unanimous. This Court is normally very slow to come to a conclusion of fact contrary to the unanimous findings of Courts from which appeals come to it. But in view of the fact that this Court was doubtful whether the directions given by the Senior Subordinate Judge to file copies of the orders produced before him as evidence of the appointment of the appellant, and of the confirmation of his appointment, as Sub-Inspector had been carried out, this Court, on the conclusion of the arguments, gave the Advocate-General an opportunity of forwarding to this Court the documents produced in the Courts below and relied upon as evidencing the appointment of the appellant by the Deputy Inspector-General of Police. This the Advocate-General has done, and this Court is now satisfied that the record before it did contain copies of all documents relied upon in the Courts below and that the suggestions that such documents did not justify the findings in the Courts below and that there may have been some other documents relating to the appointment of the appellant not produced are without foundation. In our judgment accordingly the conclusion of fact to which the Courts below have come is fully justified and the appellant having been duly appointed to and confirmed in his post as Sub-Inspector by the Deputy Inspector-General o Police, the Deputy Inspector-General was an authority who could in the circumstances legally dismiss him. The appellant has therefore no cause of action under sub-sections (1) and (2) of section 240 of the Constitution Act.

As regards the second point, it appears that before it was proposed to dismiss the appellant an enquiry was carried out into his conduct both by an Inspector of Police and by a Superintendent of Police. The appellant's complaint was that the preliminary enquiry by the Inspector was held in his absence and that at the subsequent open enquiry before the Superintendent the file prepared by the Inspector was used and he was not permitted to be represented by counsel. Both the Courts below went in detail into the evidence of these matters and were satisfied that the appellant was given a reasonable opportunity of showing cause against his proposed dismissal. Having listened with care to all that was addressed to us by

appellant's counsel, we too are convinced that on this point also the Courts below came to a right conclusion.

Accordingly this appeal fails and must be dismissed with costs.

V. S. —— *Appeal dismissed.*

## [THE FEDERAL COURT OF INDIA.]

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

Mohammad Hussain and others .. *Appellants**

*v.*

Sajawal Baksh and others .. *Respondents.*

*Government of India Act (1935), section 298 (1)—If renders invalid right of pre-emption conferred upon heirs of a vendor by section 15 of the Punjab Pre-emption Act (Punjab Act I of 1913).*

On the question whether those portions of section 15 of the Punjab Pre-emption Act which confer upon the heirs of a vendor a right of pre-emption in respect of sales of land are repugnant to the provisions of section 298 (1) of the Constitution Act,

*Held*, that from the fact that where a pre-emptor claims to exercise a right of pre-emption by virtue of his relationship to the vendor the right is based on descent, it cannot be argued that the effect of the exercise of that right is to prohibit the acquisition or holding of property by a vendee who is either not related to the vendor at all or is not related to him so nearly as the pre-emptor. No prohibition is in such a case imposed upon the vendee on account of his descent or lack of descent from any particular person. Nor does the grant of a right to one person to acquire property in preference to other persons amount to a prohibition against the acquisition or holding of property by those persons. Therefore section 298 (1) of the Constitution Act does not operate to render invalid a right of pre-emption based upon relationship with the vendor.

*K. K. Raizada*, Advocate, instructed by *B. Banerji*, Agent, for Appellants.

Respondents not represented.

*M. Sleem*, Advocate-General, Punjab (with *S. M. Sikri*), instructed by *Tarachand Brijmohanlal*, appeared for the Punjab Province in response to notice issued to him under Order 36, rule 1, F. C. R., 1942.

The Judgment of the Court was delivered by

*Zafrulla Khan, J.*—This is a defendants' appeal founded on the usual certificate under section 205 (1) of the Constitution Act from a judgment of the Lahore High Court granting the plaintiffs a decree for possession of land by pre-emption of a sale made in favour of the defendants. The question for determination in the appeal is whether those portions of section 15 of the Punjab Pre-emption Act (Punjab Act I of 1913) which confer upon the heirs of a vendor a right of pre-emption in respect of sales of land are repugnant to the provisions of section 298 (1) of the Constitution Act. This section provides, *inter alia*, that no subject of His Majesty domiciled in India shall on the ground only of descent be prohibited from acquiring or holding property. The appellants' contention was that inasmuch as the effect of the relevant portions of section 15 of the Punjab Pre-emption Act was to enable the heirs of a vendor ultimately to deprive the vendee of the benefit of a sale made in his favour, the vendee was by virtue of these provisions in effect prohibited from acquiring property, or having acquired it was prohibited from continuing to hold it. We do not think there is any force in this contention. Section 4 of the Pre-emption Act defines the right of pre-emption as the right of a person to acquire certain descriptions of property in preference to other persons, and limits its operation in the case of land to sales. Where a pre-emptor claims to exercise a right of pre-emption by virtue of his relationship to the vendor, no doubt he bases his claim upon his own descent from the vendor or from some ancestor common to the vendor and himself. If he succeeds in establishing his descent and is found to fulfil the other conditions prescribed by the Pre-emption Act, he is entitled to a decree, the broad effect of which is that on compliance with its terms he is substituted as the purchaser in place of the original vendee. But because the right of pre-emption in such cases

* Case No. 24 of 1943. 26th April, 1944.

is based on descent, it cannot be argued that the effect of the exercise of that right is to prohibit the acquisition, or holding of property by a vendee who is either not related to the vendor at all or is not related to him so nearly as the pre-emptor. No prohibition is in such a case imposed upon the vendee on account of his descent or lack of descent from any particular person. Nor does the grant of a right to one person to acquire property in preference to other persons amount to a prohibition against the acquisition or holding of property by those persons. In our judgment, therefore, section 298 (1) of the Constitution Act does not operate to render invalid a right of pre-emption based upon relationship with the vendor, and the suit was rightly decreed by the High Court.

The appeal fails and is dismissed. It was heard *ex parte* against the respondents. The Advocate-General, Punjab, appeared in response to a notice under Order 36, rule 1 of the Rules of this Court. There will therefore be no order as to costs in this Court.

V. S. —— *Appeal dismissed.*

## [THE FEDERAL COURT OF INDIA.]

[On appeal from the High Court of Judicature at Patna.]

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

Lieutenant Hector Thomas Huntley .. *Appellant**

*v.*

The King-Emperor .. *Respondent.*

*Government of India Act (1935), section 270 (1) and Criminal Procedure Code (1898), section 197—Applicability—Trial of Railway official for offence under section 161, Indian Penal Code, by the Special Tribunal constituted under Ordinance XXIX of 1943—Penal Code (1860), section 161—Nature of charge under—Duty of prosecution to establish beyond reasonable doubt.*

The station-master of a railway station was tried and convicted by the Special Tribunal constituted under Ordinance XXIX of 1943 of an offence under section 161 of the Indian Penal Code. On objection being taken to the maintainability of the prosecution in the absence of (*a*) the consent of the Governor-General under section 270 (1) of the Constitution Act and (*b*) the sanction of the Governor-General in Council under section 197, Criminal Procedure Code,

*Held*, that the objections were without force. To attract the provisions of section 270 (1) it was not sufficient merely to establish that the person proceeded against was a public servant and that while acting as a public servant, or taking advantage of his position as a public servant, he did certain acts ; it must be established that the *act complained of* was an official act. The act of receiving illegal gratification could not be an act done or purporting to be done in the execution of duty. Section 197, Criminal Procedure Code, is not applicable to cases triable under Ordinance XXIX of 1943. Section 6 (2) of that Ordinance makes the provisions of the Criminal Procedure Code except section 196-A and Chapter XXXIII applicable to proceedings of a Special Tribunal *so far as they are not inconsistent* with the Ordinance. This must be construed in the light of section 1 (2) of the Criminal Procedure Code and when so construed operates to exclude the applicability of section 197 to such proceedings. It cannot be said that the express exclusion of section 196-A furnishes an indication that section 197 was not intended to be excluded. The express exclusion of section 196-A was by way of abundant caution and cannot affect the operation of section 1 (2), Criminal Procedure Code, which expressly saves special jurisdiction and powers and special forms of procedure such as have been conferred and prescribed by the Ordinance.

A charge under section 161 of the Indian Penal Code is one which is easily and may often be lightly made, but is in the very nature of things difficult to establish, as direct evidence must in most cases be meagre and of a tainted nature. These considerations cannot however be suffered to relieve the prosecution of any part of the burden which rests upon it to establish the charge beyond reasonable doubt. If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that however strong the suspicion raised against the accused every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal.

*Held*, on the merits, that the possibility of the accused having received the money on account of demurrage (as alleged by him) which he honestly believed to be due or likely to become due had not been excluded beyond reasonable doubt and that he was hence entitled to an acquittal.

*H. G. Walford*, Senior Advocate (with *S. C. Ghose*, Advocate) instructed by *Gurudayal Sahai*, Agent, for Appellant.

* Criminal Appeal No. 2 of 1944. 24th April, 1944.

*Mahabir Prasad*, Advocate-General of Bihar (with *Gopal Prasad*, Advocate) instructed by *S. P. Varma*, Agent, for Respondent.

*Sir Brojendra Mitter*, Advocate-General of India (*H.K. Bose*, with him) instructed by *K. Y. Bhandarkar*, Agent, appeared in response to notice issued to him under Order 36, rule 1, F.C.R., 1942.

The Judgment of the Court was delivered by

*Zafrulla Khan, J.*—Ordinance No. XXIX of 1943 was promulgated by the Governor-General on the 11th September, 1943. It empowered the Central Government to constitute two Special Tribunals (section 3), and provided that the Tribunals shall have jurisdiction to try the cases allotted to them in the First Schedule (section 5). The First Schedule set out in two lists the names of persons to be tried by the Tribunals and specified in the case of each by reference to sections of the Indian Penal Code the offence or offences in respect of which they were to be tried. Entry No. 6 in the first list reads :

Lt. H. T. Huntley, Station Master, Jamalpur, E. I. Railway, Section 161, I. P. C.

Lt. Huntley (hereinafter referred to as the appellant) was tried and convicted by the Tribunal sitting in Calcutta of an offence under section 161 of the Indian Penal Code and was sentenced to 18 months' rigorous imprisonment and a fine of Rs. 500 and in default of payment of the fine to a further period of 6 months' rigorous imprisonment.

The Ordinance excluded appeals from orders and sentences of Special Tribunals (section 7) but preserved the revisional jurisdiction of the High Courts under Chapter XXXII of the Code of Criminal Procedure (section 8). The appellant accordingly moved the Patna High Court, which had jurisdiction in the matter, in revision. The High Court dismissed the revision petition but granted a certificate under section 205 (1) of the Constitution Act. Hence the appeal to this Court.

The prosecution story was that P. W. 1 approached the appellant on the 22nd May, 1943, and asked to be allotted two wagons for the despatch of sheep and goats from Jamalpur to Bally (a Calcutta suburban station). The appellant asked him to come two days later with the necessary forms. P. W. 1 returned on the 24th with the forms (Exhibits 1 and 2) duly filled in and signed, whereupon the appellant told him to wait while he telephoned to find out whether the wagons were available. After telephoning he asked him to bring the livestock for loading on the 25th. P. W. 1 said that he could not be ready on the 25th and so he was asked to come on the 26th and was told that the livestock would be despatched only if he paid the appellant Rs. 20. On the 26th, P. W. 4, an Inspector of Police got in touch with P. W. 1 and having ascertained from him how the matter between P. W. 1 and the appellant stood, arranged with P. W. 1 that he should on visiting the appellant pay him the sum of Rs. 20 in the shape of currency notes which would be provided by P. W. 4. P. W. 4 then proceeded to Monghyr and obtained formal permission from P. W. 5, the Sub-Divisional Officer, to investigate the case. P. W. 5 further agreed to accompany P. W. 4 to Jamalpur. On arrival at Jamalpur they met P. W. 1, and P. W. 4 initialled two currency notes of the value of Rs. 10 each and gave them to P. W. 1, who went into the appellant's office. P. W. 4 and P. W. 5 waited outside on the platform at a little distance. A few minutes later, P. W. 1 came out of the office and made a sign to them indicating that he had done what was required of him. P. Ws. 4 and 5 then went into the office and recovered the notes from the appellant. The case of the prosecution was that the notes were received by the appellant for himself as illegal gratification for providing the wagons required by P. W. 1. The case of the appellant was that the money was "deposited with him by P. W. 1 on account of demurrage" (para. 15 of the complaint). The Tribunal held that the prosecution case was established and that the offence with which the appellant was charged had been brought home to him.

No objection appears to have been taken before the Tribunal to the validity of Ordinance No. XXIX. Before the High Court the validity of the Ordinance was impugned and objection was also taken to the maintainability of the prosecution in the absence of (*a*) the consent of the Governor-General under section 270 (1) of the Constitution Act, and (*b*) the sanction of the Governor-General in Council under section 197 of the Code of Criminal Procedure. These objections were overruled by the High Court. The objection to the validity of the Ordinance was not pressed before us. It requires no further consideration.

With reference to the objection based on lack of consent under section 270 (1) of the Constitution Act, the learned Judges of the High Court were of the opinion that the Governor-General by promulgating the Ordinance constituting the Special Tribunals and specifying the case against the appellant as one of the cases which the Tribunals would have jurisdiction to try must be deemed to have given his consent to the initiation of the criminal proceedings against the appellant. As regards section 197 of the Criminal Procedure Code, one of the learned Judges held that the section was inapplicable as the appellant had failed to establish that he was within the category of public servants to whom that section was applicable, and the other was of the opinion that the operation of that section was excluded by section 6 (2) of the Ordinance.

These two objections were repeated and pressed before us. In our judgment they are without force. Section 270 (1) of the Constitution Act relates to proceedings instituted against a person "in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown". In *Hori Ram Singh's case*[1], this Court laid down that to attract the provisions of this section it was not sufficient merely to establish that the person proceeded against was a public servant and that while acting as a public servant, or taking advantage of his position as a public servant, he did certain acts; it must be established that the *act complained of* was an official act. In this case the act complained of was the act of receiving illegal gratification. That surely could not be an act done or purporting to be done in the execution of duty. On page 179 (1939) F.C.R. Sulaiman, J., observed:

> "For instance, if a public servant accepts as a reward a bribe in his office while actually engaged in his official work, he is not accepting it even in his official capacity, much less in the execution of any official duty, although it is quite certain that he could never have been able to take the bribe unless he were the official in charge of some official work. He does not even pretend to the person who offers the bribe that he is acting in the discharge of his official duty, but merely uses his official position to obtain the illegal gratification."

So far as the contention based on section 197 of the Code of Criminal Procedure is concerned, we consider that the ground stated by each of the learned Judges of the High Court to repel it, is adequate. The appellant has made no attempt to establish that he belongs to the class of officers who are entitled to the protection provided by that section. We are also of the view that section 197 is not applicable to cases triable under Ordinance No. XXIX. Section 1 (2) of the Code of Criminal Procedure enacts that in the absence of any specific provision to the contrary, nothing contained in the Code "shall affect any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force." Section 6 (2) of the Ordinance makes the provisions of the Code except section 196-A and Chapter XXXIII, applicable to proceedings of a Special Tribunal *so far as they are not inconsistent with the Ordinance.* This must be construed in the light of section 1 (2) of the Code and when so construed operates in our judgment to exclude the applicability of section 197 to these proceedings. It was argued that the express exclusion of section 196-A furnished an indication that section 197 was not intended to be excluded. We are unable to take that view. The express exclusion of section 196-A was in our opinion by way of abundant caution and cannot affect the operation of section 1 (2) of the Code, which expressly saves special jurisdiction and powers and special forms of procedure such as have been conferred and prescribed by the Ordinance.

1. (1939) F.C.R. 159 : 2 F.L.J. 153 (F.C.).

On behalf of the Crown it was suggested that inasmuch as section 197 relates to prosecutions in respect of offences alleged to have been committed by public servants when acting or purporting to act in the discharge of their official duty, the protection afforded by this section was limited to the kind of act contemplated in section 270 (1) of the Constitution Act, and that therefore section 197 was inapplicable to the present case for the same reason which rendered section 270 (1) inapplicable. As we have held that the objection based on section 197 fails on the grounds stated by us, it is unnecessary to decide whether the acts contemplated by section 197 of the Code are the same as those covered by section 270 (1) of the Constitution Act.

We were asked to grant leave for grounds on the merits to be urged before us. The learned Judges of the High Court did not record any finding on the merits as they considered the merits only incidentally to discover whether through any defect in procedure the accused had been deprived of the right of fair trial or whether the decision of the Tribunal was vitiated by some mistake of law. They were of the view that having regard to the practice of the Court, they were not entitled in the exercise of their revisional jurisdiction to interfere with the decision of the Tribunal, unless such a defect or mistake was shown to have occurred. In support of the prayer asking for leave it was urged that the judgment of the Tribunal had proceeded upon erroneous principles and our attention was invited to certain portions of it which appeared to lend support to this contention. On consideration leave was granted by us and thereupon it was urged that the considerations upon which the conclusions of the Tribunal were based were not fully supported by the record. Before we proceed to consider this aspect of the case it is necessary to supplement the narration of facts set out earlier in the judgment with an account of what is alleged to have passed between the appellant and P. W. 1 on the afternoon of the 26th May, 1943. P. W. 1 has stated that on entering the appellant's office he made over Exhibits 1 and 2 to him. The appellant said that he should be paid his Rs. 20 first. On this P. W. 1 made over the two initialled ten-rupee notes to him. The appellant then returned Exhibits 1 and 2 to P. W. 1 and also gave him a slip (Exhibit 3) and asked him to make over the papers to the Goods Clerk and to tell him that the goods were being despatched for military purposes. Exhibit 3 states that an application should be taken from P. W. 1 to the effect that he was despatching the goods on military account. Exhibits 1, 2 and 3 were handed over by P. W. 1 to P.W. 5 and never reached the Goods Clerk.

A charge under section 161 of the Indian Penal Code is one which is easily and may often be lightly made, but is in the very nature of things difficult to establish, as direct evidence must in most cases be meagre and of a tainted nature. These considerations cannot however be suffered to relieve the prosecution of any part of the burden which rests upon it to establish the charge beyond reasonable doubt. If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that however strong the suspicion raised against the accused every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal.

In this case, as in all cases of this kind, the direct evidence of the guilt of the appellant is that of an accomplice, namely, that of P.W. 1. We have considered his testimony very carefully and find that on several matters with reference to which the truth of the story told by him could be tested, he has either prevaricated or contradicted himself. That he purported to be in negotiation with the appellant to secure the allotment of two wagons for the transport of livestock from Jamalpur to Bally, that he visited the appellant on the 24th and 26th May, 1943, filled in and signed Exhibits 1 and 2, and handed over to the appellant on the 26th May two ten-rupee notes, are almost the only matters which have been established beyond doubt so far as his evidence is concerned. The Tribunal did notice some of the unsatisfactory features in the testimony of P. W. 1, but took the view that it was not necessary to decide how far his evidence could be believed with regard to its

uncorroborated parts. The impression left on our minds after a careful consideration of his evidence is that he is not a very satisfactory witness. He certainly permitted his anxiety to support the prosecution case to overpower his regard for truth. He was not slow to invent details which while giving a plausible colour to his story were demonstrated in cross-examination to be false.

The story that he tried to make out was that he was a partner with one Makhdum in the sheep and goats business. According to him the livestock was being despatched to Calcutta "in the ordinary course of trade as I had been doing all along." This was modified and the position was then stated to be that he was only a servant of Makhdum and had never tried to arrange for the transport of livestock before, this being the first occasion. In fact the cross-examination tended to show that Makhdum in all probability was a fictitious person and that the sheep and goats had no existence outside the imagination of P. W. 1. But of course the appellant had no reason to suspect this. When asked whether the livestock was ever despatched at all, and if so, when, P. W. 1 professed ignorance and stated that he was discharged by Makhdum on the 26th after the incident at the railway station as he had bungled the business. He started by stating that P.W. 4, whom he did not know before, got in touch with him at his residence on the morning of the 26th. In cross-examination he stated, "it is not a fact that inspector Lahiri came to see me on the 26th morning at my residence." He stated in examination-in-chief that the appellant had asked him to visit him at 4 P.M. on the 26th. In cross-examination he stated "The Inspector asked me to come to the station at 4 P.M. If he had not, I should have gone earlier after finishing my meal." As he was in the middle of his meal at 12-30 P.M. he would if left to himself have gone to the station about 1-30 P.M.

The following passages from his cross-examination are illustrative:

"When Inspector Lahiri offered to pay Rs. 20 for me it did not occur to me that in that case I might not get the wagon. He told me that he was an Inspector of Police. He did not tell me why he was offering me Rs. 20 to pay the station master.

I got Rs. 20 from Makhdum to pay to the station master when I left Monghyr. I asked the Inspector why I should take his money when I had brought it. He said that I could save my money by taking his."

The findings of the Tribunal were, however, not based solely on the testimony of P. W. 1. In the view of the Tribunal that testimony was strengthened by the facts (*a*) that the appellant gave no receipt for the Rs. 20 which he alleged he had received as deposit on account of demurrage; (*b*) that it was not the custom of railway officials to receive part-payment of any charge; (*c*) that there was no evidence on which any reliance could be placed that any demurrage would have become payable; and (*d*) that the appellant was prepared to have the goods despatched as if they were on military account. We shall proceed to consider each of these factors in the order in which we have set them out.

The appellant's case being that the amount of Rs. 20 was "deposited with him on account of demurrage," his failure to give a receipt might well be explainable. Normally a receipt would be given only when the amount of the charge to be levied had been definitely ascertained and paid in full, and in this case that could not have been done till the wagons had been loaded and were ready for despatch.

Also P. W. 3 (General Assistant in the Goods Office at Jamalpur) began by stating in his examination-in-chief that a receipt is given only when it is insisted upon, though he soon corrected himself and added that a receipt is given in every case.

We have not been able to discover on the record any evidence to the effect that it is not the custom of railway officials to receive part-payment of any charge. No doubt P. W. 2 (Assistant Superintendent of Transportation) has stated that the appellant was not entitled to take any money as security for future demurrage and that demurrage cannot be deposited in advance, but apart from the fact that

it would not be criminal to accept in advance money which had not yet legally become due, the appellant's case is not that the amount was received in advance, but that it was received in part-payment of a charge already incurred.

The question whether any demurrage would or would not have become payable has been approached by the Tribunal only from the point of view whether on the facts established any demurrage would have become legally chargeable. This in our judgment is not enough. If the circumstances were such that the appellant could honestly, though mistakenly, have believed that demurrage had or was likely to become chargeable, a payment received by him in respect of it would not render him guilty of an offence under section 161. The entry Exhibit A (1) in the Placing Wagon Register shows that wagon BA 1022 was detained for sheep loading on the 24th May. The Tribunal's criticism of this entry was that though P. W. 3 had proved it as being in the handwriting of a Shed Clerk named Dutt, the Shed Clerk was not called to state the circumstances in which it was made. Exhibit A is an official register of the railway kept by a public servant in the course of his official duties and was produced from railway custody. If the prosecution did not accept the correctness of the entry upon which the appellant relied, it was for them to produce evidence which would explain the circumstances in which it was made. The further criticism of the Tribunal that the register in which the entry appears contained blank lines and that it was possible that the entry was inserted at a later date does not appear to us to be justified. We have examined the register ourselves and find that the page devoted to entries made on the 24th May contains altogether 15 entries and that there is no blank space between the entries. This particular entry is right in the middle with seven entries above it and seven below. As a matter of fact as wagon BA 1022 was at Jamalpur on that date, it was the duty of the Shed Clerk to make an entry in the register regarding that wagon every day during which the wagon was detained at Jamalpur showing how it was being dealt with. If this entry had not been made on the 24th May, there would on that date have been no entry regarding this wagon in the register, which would have amounted to a default of duty on the part of the Shed Clerk. The entry must have been made in the regular course of official duty and does not appear to us to be open to any suspicion. On behalf of the Crown it was frankly admitted before us that the entry was genuine and that the criticism to which it had been subjected by the Tribunal could not be supported. The entry does not indicate whether the wagon was placed in position for loading on the 24th, but it does show that it was detained for the purpose of sheep loading and to that extent lends support to the appellant's case.

The Tribunal have observed that assuming that the appellant gave orders for this wagon to be detained for sheep loading, he had no authority to do so and consequently no authority to charge demurrage. The evidence does not exclude the authority of the Station Master to detain a wagon pending receipt of sanction for allotment. On the other hand, there is a sentence in the evidence of P. W. 2 which throws some doubt on the correctness of the assumption made by the Tribunal. He stated "it would be the easiest thing going for the Station Master to give a consignor two wagons though we had only allotted him one, as Jamalpur is a depot station."

P. W. 1 has stated that though he had said nothing to the appellant on the matter of the goods being required on military account, the appellant asked him to hand over Exhibit 3 to the Goods Clerk and to say that the goods were being despatched on military account. There is no other evidence on the point. The direction in Exhibit 3 that an application should be taken from P. W. 1 to the effect that the goods were being despatched on military account, tends to support the appellant rather than P. W. 1. As to the absence of a military credit note the appellant has stated that P. W. 1 told him that the credit note was with the man who was bringing the livestock from Monghyr. It may well be that P. W. 1 who has not scrupled to tell lies in his evidence when it suited him did attempt to persuade the appellant that the goods were being despatched on military account.

The appellant's contention was that he had detained one wagon for loading on the 24th May in respect of which demurrage had become chargeable. The Tribunal considered this highly unlikely, as no forwarding notes had been received up to that time. Exhibits 1 and 2 are dated the 24th May, and were certainly taken by P. W. 1 to the appellant on that date. There is nothing beyond the statement of P. W. 1 that these Exhibits were returned to him by the appellant. P. Ws. 4 and 5 do not state that P. W. 1 had Exhibits 1 and 2 with him when he went into the appellant's office on the 26th. But assuming that that was so, this would not exclude the possibility of P. W. 1 becoming liable for demurrage. P. W. 2 has stated in cross-examination that "it is necessary to give a forwarding note only when the goods are tendered, not before." It is clear that demurrage would become legally chargeable after the lapse of nine hours of daylight from the moment of placing a wagon in position for loading. In some cases goods may not be tendered for loading till several hours or even days later. In such cases demurrage would begin to accrue though according to P. W. 2 no forwarding note would have been given.

The appellant's case was that he had on the morning of the 24th May obtained sanction from Howrah over the control telephone for the allotment of a wagon to P. W. 1, and that on receipt of that sanction a wagon was placed in position for loading the same morning. The prosecution argue that this must be false as there was no possibility of the appellant communicating with Howrah by telephone on the 24th, the control telephone beyond Rampore Hat Station having been out of order since the 21st May and continuing to be out of order till some date after the 28th May. This has been sought to be established by the production of the control chart (Exhibit 8) relating to the 24th May. The chart was produced by P. W. 2. Objection was taken before us to the admissibility of the control chart on the ground that it was not prepared by P. W. 2, and that P. W. 2 was not in charge of the Control Office. Assuming, however, that the chart does show that the control telephone was out of order beyond Rampur Hat, it has not been established that there was no other means open to the appellant to get through to Howrah on the telephone from the 21st May onwards. For instance, it has not been shown that Howrah could not have been reached by telephone *via* Kiul, the junction nearest to Jamalpur on the main line. Jamalpur is an important station on the East Indian Railway system and it would be surprising if it had been permitted to remain beyond the reach of telephonic communication from Howrah for over a week and possibly much longer. P. W. 1 himself alleges some telephone conversation that the appellant purported to carry on with somebody on the morning of the 24th. The suggestion of the prosecution is that the conversation was with the Goods Yard at Jamalpur. P. W. 1 asserts that after the conversation, the appellant assured him that two wagons would be made available to him. The evidence indicates that only one wagon was available at Jamalpur. If that was so, the assurance given by the appellant to P. W. 1 seems rather to indicate that the appellant must have been in touch with Howrah. In any case the matter has been left in doubt.

The prosecution have relied upon the endorsement Exhibit 4 (2) which according to them shows that no wagon was allotted to Jamalpur on the 24th May. The endorsement was admittedly made by P. W. 2 on the 1st June, 1943, five days after the receipt of Exhibit 4 at Howrah and was not made in the regular course of duty. The suggestion is that it was made to counter or forestall any allegation on behalf of the appellant that a wagon had been allotted on the 24th May. We can only observe that if the endorsement was made with that object, it must be condemned as an attempt to persuade the Court that might be called upon to try the case to accept a mere allegation made by P. W. 2 as evidence relevant in the case. All that Exhibit 4 shows is that on the 24th May sanction for two wagons was applied for. On the 26th sanction for one wagon was granted and was communicated by means of the telegram of which Exhibit 5 is a copy. It may well be that sanction for one wagon having already been given over the telephone on the 24th, sanction for only one more wagon was required on the 26th. Again, the matter is left in doubt.

P. W. 2 no doubt stated at the trial that no allotment was made on the 24th, but as this is based on the endorsement Exhibit 4 (2) (which is not evidence) and on the indication furnished by the control chart (Exhibit 8) which by itself does not exclude the possibility of telephonic communication between Jamalpur and Howrah on the 24th, it does not, in our opinion, carry the matter any further.

P. W. 1 admits that after telephoning (whether to Howrah or to the Goods Yard), the appellant asked him to be ready to load on the 25th. It was because P. W. 1 told the appellant that he could not be ready to load on the 25th that he was given time till the 26th. From this it would be a reasonable inference that after telephoning the appellant was in a position to arrange for a wagon to be loaded on the 25th and it was because P. W. 1 asked for further time that the loading was allowed to be postponed. This coupled with the entry Exhibit A (1) shows that a wagon was detained on the 24th for the loading of livestock and that so far as the appellant was concerned could have been made available, and possibly was made available, for loading at the latest on the 25th. In these circumstances, whatever the legal position with regard to the liability of P. W. 1 for demurrage may have been, if the appellant honestly believed that demurrage had or might become chargeable, and on the 26th received Rs. 20 as a deposit on account of demurrage, he would not be guilty of an offence under section 161 of the Indian Penal Code. It must be remembered that even on the afternoon of the 26th P. W. 1 did not profess to be ready to load as, according to him, the livestock was still on its way from Monghyr to Jamalpur, and demurrage would continue to accrue.

After giving the case our very careful consideration we are not satisfied that the possibility of the appellant having received the money on account of demurrage, which he honestly believed to be due or likely to become due has been excluded beyond reasonable doubt. In coming to this conclusion we have not been unmindful of the special rule of evidence enacted in section 9 (2) of the Ordinance but it has in our judgment not been proved that the appellant accepted any gratification for himself.

We allow the appeal and direct that in place of the order of the High Court there shall be substituted an order acquitting the appellant and directing that the appellant shall be released from his bail, and that the fine, if paid by him, shall be refunded.

V. S. *Appeal allowed.*

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## [THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Nagpur.)

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

Rao Bahadur Kunwar Lal Singh .. *Appellant**

*v.*

The Central Provinces and Berar .. *Respondent.*

*Government of India Act (1935), section 205—Direct appeal to Federal Court from judgment, decree or final order of a single Judge of a High Court where appellant has a right of appeal to a divisional Bench of that High Court—Competency—C.P. Revision of the Land Revenue of Estates Act (1939) (C. P. and Berar Act I of 1939)—Increase under, of 'takoli' fixed under Gordon's Settlement—Validity—New Act if* ultra vires *and void as being contrary to section 299 (2) of the Government of India Act.*

On a contention that under section 205 of the Constitution Act no appeal would lie direct to the Federal Court from a judgment, decree or final order of a single Judge of the High Court where a certificate has been granted by him, in cases where the appellant has a right of appeal to a divisional Bench of the High Court under the Letters Patent of that High Court and that even if it was competent, the Federal Court should refuse to entertain the appeal until the right of appeal to the divisional Bench had been exercised,

*Held*, that in such a case a direct appeal to the Federal Court is authorized by sub-section (1) of section 205 of the Constitution Act. If any case is properly heard by a single Judge of a High Court

*Case No. 23 of 1943. 24th April, 1944.

and if in that case is involved a substantial question of law as to the interpretation of the Constitution Act or any Order in Council made thereunder and if there is a judgment, decree or final order given or made by that Judge, a certificate under section 205 (1) not only may but should be granted. Thereupon an appeal will be opened direct to the Federal Court subject to the provisions of sub-section (2) of section 205 and the Federal Court is entitled, if not bound, to entertain it.

It is difficult to read out of section 205, or any other section of the Constitution Act, any power or discretion in the Federal Court to refuse to hear a case in which a certificate has been granted or put an appellant on terms that his right of appeal to the divisional Bench should first be exercised and it is doubtful whether the Federal Court has any such power or discretion.

A zamindar holding some estates in the Central Provinces was assessed for 'Takoli' as part and parcel of the last periodical settlement of land revenue, known as 'Gordon's Settlement' and completed in accordance with the provisions of the C. P. Land Revenue Act, 1917. The relevant kabuliyats and orders purported to make the assessment binding for a period of 19 years and thereafter till a fresh settlement is made. As a result of the enactment of the C. P. Revision of the Land Revenue of Estates Act, 1939, the 'Takoli' assessed on the zamindar's estates was increased. On a contention by the zamindar that the 'rights' conferred on him by the Settlement of 1921, the provisions of the Act of 1917, and the relevant kabuliyats and orders, amounted to statutory or contractual rights of which only a new settlement carried out in accordance with the provisions of the Act of 1917 and the C. P. Settlement Act of 1929 could deprive him and that the alteration of his right to hold the estates subject only to the payment of the amount of 'Takoli' fixed in 1921 on the terms of that settlement could not be made, as it was purported to be made by the Act of 1939, to his detriment without complying with the provisions of section 299 (2) of the Constitution Act and as such the Act of 1939 was *ultra vires* and void;

*Held*, that there was nothing in any of the Acts or documents referred to which amounted to any contractual or statutory rights of the zamindar which could not at any time be varied, suspended or repealed by enactment of the competent Legislature. The Settlement was made and took effect under and by virtue of statutory powers and provisions which could at any time be repealed, varied or replaced by other statutory provisions duly enacted. There was nothing to prevent the Legislature of the Central Provinces and Berar, to which under section 100 and item 39 of List II in the Seventh Schedule of the Constitution Act are given powers to legislate in regard to land revenue, acting directly in the matter and enacting in respect of all or some existing assessments that the same should be increased as from a specified date to a specified amount.

It is impossible to hold that the mere increase of an assessment for land revenue involves any 'acquisition' of the land or any rights in or over immovable property. Further the word 'acquisition' implies that there must be an actual transference of, and it must be possible to indicate some person or body to whom is or are transferred, the land or rights referred to. It cannot be said that when land revenue is increased, there is any transference to the Provincial Government or any other person of any land or rights in or over immovable property, which remain in the same possession or ownership as immediately before the increase of the assessment. The attempt to bring the case within section 299 (2) must fail.

*M. R. Bobde* and *Rai Bahadur Harish Chandra*, Senior Advocates (with *G. R. Bapat*, Advocate, Nagpur High Court, who appeared for the appellant in the High Court), instructed by *Ganpat Rai*, Agent, for Appellant.

*W. B. Pendharkar*, Advocate, Federal Court (with *S. B. Palsole*, Advocate, Nagpur High Court, who appeared for the respondent in the High Court), instructed by *B. Banerji*, Agent, for Respondent.

The Judgment of the Court was delivered by

*Spens, C. J.*—The appellant, Rao Bahadur Kunwar Lal Singh, is a zamindar holding three estates in the Central Provinces known as Kamtha, Wadad and Deori-Kishori. These are held in zamindari rights and are among the zamindaris known as the Wainganga zamindaris. The zamindars are assessed periodically in respect of their estates for 'takoli'. Such assessments are made as part and parcel of the periodical settlement of land revenue for the areas in which the estates are situate. Early in January 1939 the appellant was holding his estates subject to the liability for takoli as follows :—

| | Rs. |
|---|---|
| Kamtha ... ... ... | 71,000 |
| Wadad ... ... ... ... | 19,000 |
| Deori-Kishori ... ... ... | 1,800 |

Such liability arose under and by virtue of the last periodical settlement of land revenue, namely, that known as Gordon's Settlement made in 1916-1921 and completed in accordance with the provisions of the Central Provinces Land Revenue

Act, 1917 (hereinafter referred to as 'The Act of 1917'). Assessments at the above figures were duly made in respect of the appellant's estates and duly offered in accordance with section 82 of the above Act by three kabuliyats of the 8th January, 1921. These were deemed to have been accepted and made binding by three orders of the 5th of May, 1921, made in accordance with the provisions of section 87 of the said Act. The said kabuliyats and orders were produced as exhibits in the action and were numbered P. 4, 5, 6, 7, 8, 9 respectively. It is to be noted that the kabuliyats and orders in respect of the Kamtha and Wadad estates purported to make the assessments binding for the period of "19 years, that is, from the 1st of July, 1919 A.D. up to the 30th June, 1938 and thereafter till a fresh settlement is made"; whereas the kabuliyat and order in respect of the Deori-Kishori estate were for the period of 19 years from the 1st of July, 1920 to the 30th June, 1939, and thereafter till a fresh settlement was made.

Section 88 of the Act of 1917, so far as material, provides as follows :—

"88. If the assessment of an estate, mahal, or land has been accepted under this Act, the proprietors shall be bound to pay the land revenue assessed thereon, together with, in the case of an estate or mahal, the land revenue assessed on any separately assessed plots of land included therein, from such date and for such term as the Provincial Government may appoint in this behalf, or, if at the expiry of such term no new assessment has been made and is ready to take effect, until a new assessment has been made and is ready to take effect. . . ."

The Act of 1917 was amended, supplemented or varied in matters not material to this case by the Central Provinces Settlement Act of 1929 (Act No. VI of 1929).

On the 6th of January, 1939, the Central Provinces Revision of the Land Revenue of Estates Act, 1939 (Central Provinces and Berar Act No. I of 1939) purported to take effect. The said Act (hereinafter called "The Act of 1939" provided by section 2 :—

"2. With effect from the 1st of July, 1938, the land revenue payable to Government in respect of the estates named in the second column of the Schedule under their current settlement shall, notwithstanding any contract to the contrary or anything contained in the Central Provinces Settlement Act, 1929, or in Chapter VI of the Central Provinces Land Revenue Act, 1917, but without prejudice to the proviso to sub-section (1) of section 85 of the latter Act, be enhanced to the amounts shown in the third column of the said Schedule."

And in the schedule appear the following entries :—

| | Rs. |
|---|---|
| Kamtha ... ... ... | 93,386 |
| Wadad ... ... ... | 24,250 |
| Deori-Kishori ... ... ... | 2,570 |

Since the passing of the said Act, by agreement the following figures have been substituted for those quoted above from the Schedule :—

| | Rs. |
|---|---|
| Kamtha ... ... ... | 91,440 |
| Wadad ... ... ... | 23,702 |
| Deori-Kishori ... .. ... | 2,544 |

Moreover section 2 of the said Act has been amended by the Central Provinces and Berar Act (Act No. XII of 1941) so as to read as follows :—

"2. With effect from the 1st of July, 1938, the land revenue payable to Government in respect of the estates named in the second column of the schedule under their current settlement shall, notwithstanding any contract to the contrary or anything contained in the Central Provinces Settlement Act, 1929, or in Chapter VI of the Central Provinces Land Revenue Act, 1917, be the amounts shown in the third column of the said schedule and the said amounts shall be deemed to have been assessed, offered and accepted under the said Chapter."

The result of the above legislation is to increase the takoli assessed on the above estates by the following amounts :

| | Rs. |
|---|---|
| Kamtha ... ... ... | 20,440 |
| Wadad ... ... ... | 4,702 |
| Deori-Kishori ... ... ... | 744 |
| Total ... | 25,886 |

In due course the appellant started an action against the Provincial Government in the Court of the Additional District Judge, Bhandara, in which he claimed that at the time when the Act of 1939 purported to become effective he was entitled under the provisions of the existing settlement and the Act of 1917 and the material kabuliyats and orders above referred to to continue to hold his zamindari estates so long as the respective amounts of takoli for which they were assessed by that settlement were paid until a new settlement was "made in accordance with the provisions of the law that is applicable to all proprietors owning land-revenue-paying estates or properties," that no such new settlement had been made but that instead the Act of 1939 had been passed which extinguished or deprived the appellant of his contractual as well as statutory rights in his zamindaris and, further, amounted to an acquisition or expropriation of his rights as provided by section 299 of the Government of India Act, 1935, for some purpose which the Government had in view. He asked for a declaration that the Act of 1939 was accordingly null and void, or that the Central Provinces Legislative Assembly had no power to enact the Act of 1939 without making provision for compensation under section 299 of the Constitution Act, and that the same Legislature could not enact the Act of 1939 so as to override the contractual or statutory rights of the plaintiff under the Act of 1917 and Act No. VI of 1929 and that for these reasons the Act of 1939 which was enacted by it was *ultra vires* and not binding on the plaintiff.

On the 21st of October, 1940, an order was made under section 225 of the Constitution Act transferring the action for trial in the High Court at Nagpur. On the 27th February, 1941, an application was made, and refused, to refer the suit to the Chief Justice to be placed before a Bench of two Judges for trial. On the 25th of January, 1943, and the following days this case, with another of a similar nature, came on for trial before Mr. Justice Vivian Bose alone. On the 31st of January, 1943, Bose, J., dismissed the action with costs, but granted a certificate under section 205 of the Constitution Act. From this order an appeal was brought direct to this Court.

Upon this appeal coming on for hearing by this Court, a preliminary objection was taken on behalf of the respondents that under section 205 of the Constitution Act no appeal would lie direct to the Federal Court from a judgment, decree or final order of a single Judge of a High Court where a certificate has been granted by him, in cases where the appellant has a right of appeal to a divisional Bench of a High Court, as in fact the appellant had in this case under the Letters Patent of the High Court at Nagpur. Stress was laid on the provisions in the Letters Patent relating to appeals to His Majesty in Council, by which no appeal from the order of a single Judge is permitted direct to His Majesty in Council, in cases where an appeal to a divisional Bench is permissible. No similar express provision exists in the Constitution Act either in section 205 or elsewhere. A similar point arose before this Court, but was not decided, in the case of *Thakur Jagannath Baksh Singh* v. *United Provinces*[1]. On consideration, we are of opinion that a direct appeal to this Court in this case is authorised by sub-section (1) of section 205. If any case is properly heard by a single Judge of a High Court, and if in that case is involved a substantial question of law as to the interpretation of the Constitution Act or any Order in Council made thereunder and if there is a judgment, decree or final order given or made by that Judge, in our judgment a certificate under section 205 (1) not only may but should be granted. Thereupon an appeal will be opened direct to this Court subject of course to the provisions of sub-section (2) of section 205. It may well be that if an appellant prefers to exercise his right to appeal to this Court under section 205 in preference to first exercising a right of appeal to a divisional Bench and obtaining a further certificate from such divisional Bench, he may deprive himself before this Court of the *right* to appeal given by sub-section (2) of section 205 on grounds on which he could have appealed without special leave to His Majesty in Council if no certificate had been granted. If he comes direct to this

1. (1943) 6 F.L.J. 55 (F.C.).

Court, he will have to rely in regard to any such grounds on obtaining the leave of this Court to be heard thereon as further provided by sub-section (2). In our opinion, Bose, J., properly gave a certificate in this case and the appellant was therefore entitled to appeal direct to this Court; and this Court is entitled, if not bound, to entertain this appeal. It was suggested, but not strongly pressed, that, even if the appeal was competent, this Court should refuse to entertain the appeal until the right of appeal to the divisional Bench had been exercised. It is difficult to read out of section 205, or any other section of the Constitution Act, any power or discretion in this Court to refuse to hear a case in which a certificate has been granted, or to put an appellant on any such terms as those suggested. We are doubtful if this Court has any such power or discretion. It is however of no importance in this case, for we certainly see no reason to impose on the parties the burden and expense of an intermediate appeal to a divisional Bench before disposing of the two points on which this appeal has been based.

On behalf of the appellant it was submitted that such were the rights of the appellant conferred on him by the Settlement of 1921, the provisions of the Act of 1917, and the material kabuliyats and orders referred to that (*a*) they amounted to statutory or contractual rights of which only a new settlement carried out in accordance with the provisions of the Acts of 1917 and 1929 could deprive him, (*b*) that the alteration of what he called his "right" to hold his estates subject only to the payment of the amounts of takoli fixed in 1921 on the terms of that settlement could not be made, as it was purported to be made by the Act of 1939, to his detriment without involving a compulsory acquisition for public purposes of some right belonging to him in or over immovable property and that as the Act of 1939 did not provide for the payment of compensation for the property so acquired and did not either fix the amount of the compensation or specify the principles on which and the manner in which it was to be determined it was *ultra vires* and void as being contrary to or not complying with the provisions of section 299, sub-section (2) of the Constitution Act.

As regards the first point, it may well be that the appellant may have believed, reasonably enough, in reliance upon the provisions and documents referred to, that he was going to hold his estates subject to the payment only of the takoli fixed in 1921 for the periods specified in the kabuliyats and thereafter until a new settlement was made and that that new settlement would be made in accordance with the Acts of 1917 and 1929. But we can find absolutely nothing in any of the Acts or documents referred to which amounted to any contractual or statutory rights of the appellant which could not at any time be varied, suspended or repealed by enactment of the competent Legislature. The settlement was made and took effect under and by virtue of statutory powers and provisions which could at any time be repealed, varied or replaced by other statutory provisions duly enacted. In particular by enactment any new form or provisions for the next settlement could have been prescribed at any time. In our judgment there was nothing to prevent the Legislature of the Central Provinces and Berar, to which under section 100 and item 39 of List II in the Seventh Schedule of the Constitution Act are given powers to legislate in regard to land revenue, acting directly in the matter and enacting in respect of all or some existing assessments that the same should be increased as from a specified date to a specified amount. It may be regarded by some persons as a drastic form of legislation; in so far as it only increases some and not all assessments it may also be regarded as invidious legislation, but these are not matters for us. We are only concerned with the legality of the legislation; and we are quite unable on the suggested grounds to find any reason for questioning the validity of the Act under consideration.

As regards the second point, the case of the appellant is based on the view that under the settlement of 1921, the Act of 1917, the kabuliyats and orders referred to he enjoyed a " right " to hold his estates subject only to the payment of the amounts of takoli fixed in 1921 and that the increase of the amount of takoli so payable on

his estates to a higher figure involves the acquisition from him of a right in or over immovable property to the extent to which his position is made worse by the increase of the amount of takoli payable. In our judgment, this view is misconceived. His rights over his land or his rights in or over his immovable property remain exactly the same, only his liability for payment of takoli is increased. It is, we think, impossible to hold that the mere increase of an assessment for land revenue involves any acquisition of the land or any rights in or over immovable property. It further seems to us that the word "acquisition" implies that there must be an actual transference of, and it must be possible to indicate some person or body to whom is or are transferred, the land or rights referred to. It is impossible, in our view, to suggest that when the land revenue is increased, there is any transference to the Provincial Government or any other person of any land or rights in or over immovable property, which remain in the same possession or ownership as immediately before the increase of the assessment. In our judgment the attempt to bring the case within section 299 (2) must fail.

For these reasons this appeal fails and must be dismissed with costs.

V. S. *Appeal dismissed.*

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## [PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT:—LORD MACMILLAN, LORD WRIGHT AND SIR GEORGE RANKIN.

K. R. Easwaramurthy Goundan .. *Appellant**

*v.*

The King-Emperor .. *Respondent.*

*Indian Penal Code (XLV of 1860), section 216—Essentials for conviction under—Absence of legal proof of issue of warrant of arrest of person said to have been harboured—Effect—Objection based on such want of legal proof not a technical one but substantial and decisive in character—Evidence Act (1872), sections 62, 64 and 65—Legal proof of issue of warrant of arrest—Criminal Procedure Code (1898), section 87—Issue of proclamation under—Effect—No notice to the public of its contents—Meaning of the word "knowing" in section 216, Indian Penal Code—Privy Council practice—Criminal appeal by special leave—Judicial Committee not concerned with formal rules but only with the question of miscarriage of justice.*

Section 216 of the Indian Penal Code requires, if the offence under it is to be established, first that there has been an order for the apprehension of a certain person as being guilty of an offence; secondly, knowledge by the accused party of the order; thirdly, the harbouring or concealing by the accused of the person with the intention of preventing him from being apprehended.

Where there is no evidence admissible in law to prove the essential foundation of the case for the prosecution in respect of such an offence, namely, that any order had ever been made for the arrest of the person said to be "harboured", a conviction under section 216 cannot be sustained.

It is erroneous to treat an objection as to want of legal proof of issue of the warrant of arrest as a technical one, for it is both substantial and decisive in character.

Sections 62, 64 and 65 of the Evidence Act define the only evidence which the law permits in order to prove a warrant of arrest. A warrant of arrest is a public document which affects the personal liberty of the subject. Any laxity of proof in regard to it might have serious consequences.

There is nothing in section 87, Criminal Procedure Code, which makes the proclamations issued thereunder legal evidence of the issue of the warrant or order of arrest. Nor can the words of sub-section (3) of section 87 be read as overriding the requirements of the Evidence Act or as making the proclamation evidence that the warrant had been issued. Nor does section 87 expressly or by implication make the proclamation equivalent to notice to the public of its contents, or even to the inhabitants of the town or village where it is published.

The word "knowing" used in section 216, Indian Penal Code, means something more than and different from the words "had reason (or sufficient cause) to believe". The latter words might be satisfied though no warrant had in fact been issued. "Knowing"

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*P.C.A. No. 1 of 1943. 23rd February, 1944.

however implies a fact which can be shown. It does not necessarily import actual evidence of the senses, but it does import knowledge of something actual by means of authentic or authoritative information.

In a criminal appeal brought by special leave of His Majesty in Council, the Privy Council are not concerned with formal rules like those relating to concurrent findings of fact in the Court below, but only with the question, whether there has been a miscarriage of justice.

Their Lordships' Judgment was delivered by

LORD WRIGHT.—The appellant, a wealthy landowner, merchant and banker with large interests in Tiruppur, where he resided, and other places in the Province of Madras was charged along with ten other persons under section 216 of the Indian Penal Code with the offence of "harbouring" two persons who were suspected of having committed a murder on or about the 8th March, 1940. The murdered man was Muthu Goundan of Othuvillaipudur. The police formed the opinion that the murder was committed by four persons, all of them Valayans, a low tribe among the depressed and criminal classes of Madras, aided and abetted by one R.V.I. Goundan, the father-in-law of the appellant. Two of these four Valayans are the persons whom the accused was said to have "harboured". These men, along with R.V.I. Goundan, being subsequently tried for the murder or abetment were acquitted. Of the eleven men later charged with "harbouring" ten including the appellant were convicted by the Sub-Divisional Magistrate who tried the case, the appellant being sentenced to six months' rigorous imprisonment and a fine of Rs. 1,000, with a further three months' rigorous imprisonment in default of paying the fine. On appeal, the Sessions Judge set aside all the convictions and sentences. On a further appeal by the prosecution from the orders of acquittal, Horwill, J., who heard the appeal in the High Court of Madras, confirmed all the acquittals except that of the appellant; as to him, the Judge restored the conviction and sentence passed by the Sub-Divisional Magistrate. Special leave to appeal was granted to the appellant by His Majesty in Council.

In the result, as will appear later; their Lordships arrived at the opinion, on the conclusion of the arguments, that the appeal should be allowed on the ground that there was no evidence admissible in law to prove the essential foundation of the case for the prosecution, namely, that any order had ever been made for the arrest of the two men said to have been "harboured". In view of the *decisive character* of this objection to the conviction, it will be enough here to summarise as shortly as possible the material facts and to outline the course which the proceedings below took. First, however, the terms of section 216 must be set out. That section is in the following terms:

"*Section* 216:—. . . . . . whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such. . . . order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say, if the offence for which the person . . . . . is ordered to be apprehended is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;. . . . . . ."

The section requires, if the offence is to be established, first that there has been an order for the apprehension of a certain person as being guilty of an offence, secondly knowledge by the accused party of the order, thirdly the harbouring or concealing by the accused of the person with the intention of preventing him from being apprehended. The character of a warrant of arrest is defined in section 75 of the Code of Criminal Procedure, 1898, as follows:—

"*Section*.75. (1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or in the case of a Bench of Magistrates, by any member of such Bench; and shall bear the seal of the Court. . . . . .

"(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed".

The form prescribed for such a warrant is set out in Sch. V of the Code.

"Schedule V. Form II.—Warrant of Arrest. (*See* section 75.)

"To (name and designation of the person or persons who is or are to execute the warrant) Whereas of stands charged with the offence of (state the offence), you are hereby directed to arrest the said and to produce him before me. Herein fail not.

Dated this day of 19 .

"(Seal)".

A warrant or order of this character is a public document, and the conditions necessary to prove it are prescribed in sections 62, 64 and 65 of the Evidence Act, which are in the following terms:—

"62. Primary evidence means the document itself produced for the inspection of the Court.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

(*a*) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or, of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(*b*) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(*c*) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect, produce it in reasonable time;

(*d*) when the original is of such a nature as not to be easily movable;

(*e*) when the original is a public document within the meaning of section 74;

(*f*) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence;

(*g*) when the originals consist of numerous accounts of other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (*a*), (*c*) and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents".

The ten persons charged together with the appellant were (1) the pattagar or proprietor of an estate at Palayakottai, in the grounds of which the two suspected Valayans were eventually arrested, and eight other persons who were servants of the pattagar, the appellant and another person said to have assisted the appellant. The appellant was arrested on the 29th September, 1940, the pattagar and others arrested with him having been arrested on the 23rd August, 1940. The charge against the appellant was in due course framed by the Sub-Divisional First Class Magistrate of Coimbatore. It was dated the 18th January, 1941, and was in the following terms:—

"That on or about the 13th day of July, 1940, Soratta Valayar, son of Vattai Valayar, and Kuravalayar, son of Alaga Valayar were ordered to be apprehended for an offence under

section 302, by the Sub-Magistrate, Udumalpet, a public servant in the exercise of his lawful powers as such public servant, and that you knowing of the said order for apprehension on or about the 22nd day of August, 1940, at Palayakottai harboured the said Soratta Valayar and Kuravalayar with the intention of preventing them from being apprehended and thereby committed an offence punishable under section 216 of the Indian Penal Code, and within my cognizance".

The charge referred to an order, though without giving any precise date for it. It specified the place and date of the offence and alleged that the accused knew of the alleged order before the date of the alleged offence, which was said to have been committed on or about the 22nd August, 1940. It is clear that it was necessary for the prosecution to establish that before that date the order existed and was known to the appellant, and that the acts amounting to harbourage were done by the appellant with that knowledge. The prosecution sought to prove both that the warrant of arrest had been issued and that the appellant knew of its issue by means of two proclamations, one in respect of each of the two suspected Valayans. These were except for the name of the particular suspect in identical terms. It will be enough to quote one of them.

"IN THE COURT OF THE SUB-MAGISTRATE UDUMALPET.

R.C. NO. XI OF 1940 CALENDAR CASE.

WHEREAS complaint has been made before me that Soratta Valayan, son of Sellappan *alias* Vettai Valayan, Nallur, Palladam Taluq, has committed (or is suspected to have committed) the offence of murder, punishable under section 302 of the Indian Penal Code, and the warrant of arrest issued was returned with the endorsement that the said Soratta Valayan could not be found and whereas it has been shown to my satisfaction that the said Soratta Valayan has absconded (or is concealing himself to avoid the execution of the said warrant);

Proclamation is hereby made that the said Soratta Valayan is required to appear at Udumalpet Camp before this Court, to answer the said complaint on the 18th August, 1940, at 10 a.m.

Dated this 5th day of July, 1940. (Signed). John A. Samuel,
Sub-Magistrate".

There was no evidence at all in this case to show that the proclamations or either of them came to the knowledge of the appellant, or that he had ever visited Nallur, or that it was reasonable to assume that he had done so, or (apart from the evidence of his alleged association with the two Valayans) that he had ever associated with the type of person usually to be found in a Valayan village.

It is obvious that there could not be proof that the appellant knew of the orders or warrants of arrest, unless or until the issue of the warrants had been proved. The proclamation was made under section 87 of the Code of Criminal Procedure, but there is in their Lordships' opinion, as will be explained later, nothing in that section which makes the proclamations legal evidence of the issue of the warrant or order of arrest, nor is there anything either in section 87 or in the facts of the case which makes it possible to impute to the appellant notice of the proclamations or their terms. This makes it unnecessary to comment on the curious fact that the date of the warrants of arrest given in the proclamations (the 5th July, 1940.) differs from the date given in the charge (on or about the 13th July, 1940). It will not be surprising that the same vagueness as to dates recurs in the evidence called to establish the "harbouring". There was some discussion as to what were the dates of the various occurrences spoken to by the evidence, but there is in their Lordships' opinion no evidence to show that there ever were the orders or warrants proof of which was essential to the prosecution's case, so that it will not be necessary to make any meticulous examination of the evidence. It is sufficiently clear in their Lordships' opinion that the Sessions Judge was right in his conclusion

on this aspect of the case, which was in effect that even on the prosecution's evidence the appellant brought the Valayans to the pattagar's compound nearly four months before the proclamations were issued and was not said to have associated with them at that place later than six weeks before the proclamations. The Sessions Judge in his judgment pointed out that although the necessary warrants or orders had not been filed, he nevertheless felt justified in inferring from the terms of the proclamations that they had been issued. On this point their Lordships are unable to agree with the Sessions Judge for reasons to be stated later. But they do agree with his conclusion that, even assuming, as he did, that the warrants had in fact been issued, it had not been proved that the appellant knew of them. He went on to emphasise the difference between the positive word "knowing" used in section 216 and the words "has reason to believe" used in section 212 of the Code as an alternative to "knows". He also referred to the definition of "has reason to believe" in section 26 of the Code as meaning "having sufficient cause to believe". In their Lordships' opinion the Sessions Judge was right in holding that the word "knowing" means something more than and different from the words "had reason (or sufficient cause) to believe". The latter words might be satisfied even though no warrant had in fact been issued. "Knowing" however implies a fact which can be shown. It does not necessarily import actual evidence of the senses, but it does import knowledge of something actual by means of authentic or authoritative information. The Sessions Judge also held that the proclamations could not be deemed to establish that the appellant "knew" of the issue of the warrants. He accordingly held that the appellant should be acquitted.

Horwill, J., on appeal reversed that decision. It is not necessary to examine his analysis of the evidence of fact. It is enough to say that their Lordships prefer in general that of the Sessions Judge. But he, erroneously, as their Lordships think, treated the objection that the issue of the warrants had not been proved as a "technical" objection, and he rejected or disregarded the distinction between "knowing" and "having reason to believe". He read section 216 as if it contained the latter words. These two errors are, in their Lordships' opinion, sufficient to vitiate his judgment and the resulting conviction and sentence.

But their Lordships think that the appeal should be allowed on the single ground that there is no evidence that the warrants or orders were even issued. Sections 62, 64 and 65 of the Evidence Act define the only evidence which the law permits in order to prove a warrant of arrest, and that is under section 62 of the Act production of the original order, or, under the conditions specified in section 65, of a certified copy. A warrant of arrest is a public document which affects the personal liberty of the subject. The statute as quoted above prescribes its form. It has to bear the appropriate signature and seal. Any laxity of proof might have serious consequences. It might for instance lead to error as to the identity of the person to be apprehended. Secondary evidence other than a certified copy would not necessarily or even obviously show that the statutory form had been complied with. But it is unnecessary to emphasise this point. The objection taken on the appellant's part is not technical but substantial. Mr. Roberts, the able counsel for the Indian Government, did not in the end contest its validity. Indeed, he said that the Indian Government would not countenance any relaxation of the stringency in regard to warrants of arrest under sections 62 and 65.

It is sufficient to refer briefly to an argument based on sub-section (3) of section 87, the words of which are as follows:—

"(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that

the requirements of this section have been complied with, and that the proclamation was published on such day".

Their Lordships cannot read these words as overriding the requirements of the Evidence Act or as making the proclamation evidence that the warrants had been issued. The method of proving the warants is not a requirement of the section which is merely dealing with the proclamation itself and the mode of publishing it and the like. Nor does section 87 expressly or by implication make the proclamation equivalent to notice to the public of its contents, or even to the inhabitants of the town or village where it is published.

Some reference was made to the rule relating to concurrent findings of fact in the Courts below. If that rule applied at all it would involve concurrent findings in all the Courts below, whereas here there are such findings in only two out of three. But in a criminal appeal brought by special leave of His Majesty in Council, their Lordships are not concerned with formal rules, but only with the question whether there has been a miscarriage of justice, as in their opinion for the reasons given there has been in this case.

In their judgment the appeal should be allowed and the conviction set aside.

They will humbly so advise His Majesty.

V. S. *Appeal allowed.*

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[PRIVY COUNCIL.]

(On Appeal from the High Court of Judicature at Lahore.)

PRESENT:—LORD MACMILLAN, LORD WRIGHT, LORD PORTER, LORD CLAUSON AND SIR GEORGE RANKIN.

Prabhu .. *Appellant**

*v.*

The King-Emperor .. *Respondent.*

*Criminal trial—Jurisdiction—Plea in bar of—Illegal arrest in foreign territory—Subsequent extradition and surrender by the foreign Court—Legality of trial and conviction not affected—Notification conferring jurisdiction—Interpretation—Dots below an entry.*

Though the procedure taken to bring an accused within the jurisdiction of the country in which he had committed an offence may be irregular and improper, if he is there, and if he had committed the offence with which he is charged, it is no answer to the offence that he had been brought irregularly within the jurisdiction of that country.

By an agreement between the British Government and the State of Jind, the former was given full and exhaustive power and jurisdiction of every kind over the lands in the State of Jind which were occupied by the Southern Punjab Railway. A subject of Jind was arrested by the British Indian Police outside the limits of the lands so ceded, in respect of a murder alleged to have been committed by him in a train of the said Railway while running through the State of Jind. He was subsequently extradited and handed over to the authority of the British Indian Department who had jurisdiction in respect of the offence and was convicted. On a contention that the arrest of the accused was illegal and that the illegality of the arrest vitiated the whole subsequent proceedings,

*Held*, negativing such a contention, that assuming that the arrest was open to objection as an infringement of the sovereignty of Jind, the validity of the trial, and conviction of the accused was not affected by any irregularity in his arrest. When the accused was presented for trial at the Court which tried him he had been validly surrendered to that Court by the Jind authorities and so far as that Court was concerned everything was regular and in order.

For purposes of criminal jurisdiction within the lands occupied by certain state railways the notification set out in tabular form of three columns, the name of the Railway, the State to which it belonged and the Court having jurisdiction to try offences. Two dots alone appeared below the name of a particular Court in the third column.

*Held*, that the two dots were typographically equivalent to "do" or "ditto" and the words of the previous entry were thereby made applicable to the subsequent entry also.

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*P.C. A. No. 27 of 1943. 26th January, 1944.

Their Lordships' Judgment was delivered by

LORD MACMILLAN.—At the conclusion of the arguments in this case on 26th January, 1944, their Lordships announced that they would humbly advise His Majesty that the appeal be dismissed. They now state their reasons for this advice.

On 15th August, 1942, the Sessions Judge of Rohtak in British India found the appellant guilty on a charge of murdering his uncle Nanhu. The appellant was sentenced to death and on appeal to the High Court of Lahore the conviction and the sentence were confirmed. On a petition to His Majesty in Council special leave to appeal in *forma pauperis* was granted to the appellant.

The validity of the conviction was challenged before their Lordships on two grounds, *viz.*, that the appellant had been illegally arrested; and (2) that the Court which tried him had no jurisdiction to do so.

1. For the appreciation of this point a short narrative of the facts is necessary. The appellant is not a British subject, but is a native of the State of Jind in which he resided. The murder with which he was charged was committed in a train while it was running between two stations on the Southern Punjab Railway within the State of Jind. By an agreement entered into between the British Government and the State of Jind in 1900 the Rajah ceded to the British Government

"full and exhaustive power and jurisdiction of every kind over the lands in the said State which are or may hereafter be occupied by the Southern Punjab Railway . . . . . and over all persons and things whatsoever within the said lands." (Aitchison's "Treaties," 5th Ed., Vol. I, 282, No. LI).

The body of the deceased was discovered on 15th October, 1941, in a train at Kinana Station in Jind State by a constable of the British Indian Railway Police. At Jind, the next Station, he reported his discovery to a Sub-Inspector of the British Indian Railway Police. The latter undertook the investigation of the matter and prepared a first information report. The body was taken next day to Rohtak within British India for *post mortem* examination. On the 18th of October the Sub-Inspector arrested the appellant at a place in the State of Jind outside the railway. He produced the appellant on the same day before the District Magistrate of Jind who remanded the appellant to the custody of the police of the State of Jind, by whom the appellant was temporarily transferred to the British Indian Railway Police for investigation. On 22nd October the Sub-Inspector of the Railway conveyed the appellant to Rohtak. A confession by the appellant was recorded by the Magistrate there who thereafter remanded the appellant to the judicial lock-up. On 14th January, 1942, the appellant described as now confined in the judicial lock-up, Jind, was formally extradited and sanction given by the Nizamat Jind for him to be handed over to the authorities of Rohtak District. This was duly effected and the appellant was brought to trial and convicted at Rohtak as already stated.

The contention of the appellant was that his arrest, having been effected in Jind territory by a British Indian Officer, was illegal and that the illegality of his arrest vitiated the whole subsequent proceedings. Their Lordships reject this contention. They assume that the arrest was open to objection as an infringement of the sovereignty of Jind, although the Jind authorities, so far from resenting what had been done or regarding their rights as having been flouted, co-operated most readily with the British Indian police in bringing the appellant to justice. There was no suggestion of anything like kidnapping. In their Lordships' view the validity of the trial and conviction of the appellant was not affected by any irregularity in his arrest. When the appellant was presented for trial at Rohtak he had been validly surrendered to the Court

there by the Jind authorities and so far as that Court was concerned everything was regular and in order.

In the case of Ex parte *Susannah Scott*[1], the accused, a British subject charged with a crime committed in this country, had absconded to Belgium and was arrested there by a British police officer and brought back to England. On objection being taken at the trial to the validity of the arrest Lord Tenterden, C.J., said at p. 448:

"The question therefore is this, whether if a person charged with a crime is found in this country it is the duty of the Court to take care that such a party shall be amenable to justice or whether we are to consider the circumstances under which she was brought here. I thought, I still continue to think, that we cannot inquire into them".

In *Emperor* v. *Vinayak Damodar Savarkar*[2], the illegality of the arrest of the accused was pleaded and was held to be irrelevant. Scott, C.J., quoted from the charge to the jury of Lord Chief Justice Cockburn in the case of *The Queen* v. *Nelson and Brand*[3], in which this passage occurs:—

"Suppose a man to commit a crime in this country, say murder, and that before he can be apprehended he escapes into some country with which we have not an Extradition Treaty, so that we could not get him delivered up to us by the authorities, and suppose that an English police officer were to pursue the malefactor, and finding him in some place where he could lay hands upon him and from which he could easily reach the sea, got him on board a ship and brought him to England, and the man were to be taken in the first instance before a Magistrate, the Magistrate could not refuse to commit him. If he were brought here for trial, it would not be a plea to the jurisdiction of the Court that he had escaped from justice and that by some illegal means he had been brought back. It would be said 'Nay, you are here; you are charged with having committed a crime and you must stand your trial. We leave you to settle with the party who may have done an illegal act in bringing you into this position; settle that with him'."

The appellant can derive no assistance from the case of *Muhammad Yusuf-ud-din* v. *The Queen Empress*[4]. In that case the arrest in Hyderabad State by a British Railway constable of a British subject charged with bribery committed at Simla in British India was held to be illegal. The only question at issue was whether the arrest was lawful or not and Lord Chancellor Halsbury in delivering the judgment of their Lordships expressly stated that they had not anything to do with the consequences of the arrest being lawful or otherwise. In the course of the argument the Lord Chancellor incidentally observed, as appears from a record in the possession of the India Office:—

"It may well be that the procedure taken was irregular and improper and brought a person wrongfully within the jurisdiction, but if he is there and if he has committed an offence, whatever else may be said about it, it is no answer to the offence committed within the jurisdiction that he has been brought irregularly within the jurisdiction. That has been decided more than once in our Courts. There was a case where a man was tried for murder in which it was clear that he was not properly arrested in the jurisdiction where he was found, but nevertheless he was tried, convicted and executed".

The appellant therefore fails on his first point.

2. The second point may be said to be typographical rather than legal. In the Gazette of India of 5th July, 1924, there appeared a Notification by the Governor-General in Council that, for the purposes of criminal jurisdiction, within the lands occupied by the railways specified in the first column of an annexed schedule and lying within the States specified in the second column the

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1. (1829) B. & C. 446.
2. (1910) I.L.R. 35 Bom. 225.
3. Charge to the Grand Jury in the case of *Queen* v. *Nelson and Brand*. Edited by Frederick Cockburn, London: William Ridgway, 1867, pp. 118-9.
4. (1897) L.R. 24 I.A. 137: I.L.R. 25 Cal. 20 (P.C.).

Court mentioned in the third column should exercise the powers of a District Magistrate. The following is an extract from the schedule as it appeared in the Gazette:—

6. Southern Punjab Railway
MAIN LINE.

| | | |
|---|---|---|
| Gaddarbaha-Budhlada ... | Patiala ... | The Deputy Commissioner, Ferozepur. |
| Budhlada-Jind Frontier near Uchana. | Patiala ... | The Deputy Commissioner, Rohtak. |
| Jind Frontier near Uchana-Karainthi ... | Jind ... | ...... |

The portion of the Southern Punjab Railway with which this case is concerned is that described in the first column as "Jind Frontier near Uchana-Karainthi"; in the second column it is shown as lying within the State of Jind; in the third column, where the appropriate Court should be entered, there are two dots. The appellant says that these dots are meaningless and that the Governor-General in Council has failed to indicate any Court by which cases from this portion of the railway should be heard. Their Lordships have no hesitation in rejecting this contention. It is in their opinion quite clear that the two dots are typographically equivalent to "do" or "ditto", and that the words "The Deputy Commissioner, Rohtak," are thereby made applicable to the portion of the railway in question with the consequence that the Court at Rohtak had jurisdiction to try the appellant. Their Lordships so read the Notification as printed in the Gazette irrespective of certain domestic documents produced on behalf of the respondent in support of this reading which, to say the least of it, are of dubious evidential value or admissibility.

The appellant having thus failed, for the reasons indicated to make good either of his two points, their Lordships advised His Majesty that the appeal be dismissed.

V.S. *Appeal dismissed.*

## [PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Nagpur.)

PRESENT:—LORD ATKIN, LORD PORTER AND SIR GEORGE RANKIN.

Seth Manakchand .. *Appellant**

*v.*

Chaube Manoharlal and another .. *Respondents.*

*Mortgage—Suit for foreclosure—Discharge of a defendant claiming paramount title—Final foreclosure decree in suit—Issue of warrant of possession against the discharged defendant in execution of the final decree—Legality—Interpretation of decree—Judgment the most material document.*

In a suit brought by the respondents to enforce a mortgage, the appellant who was impleaded as one of the defendants claimed a paramount title and was on his own application discharged from the suit. The respondents thereafter obtained in due course a final decree for foreclosure and in execution thereof succeeded in getting an order for the issue of a warrant of possession against the appellant. On a contention that such an order could not be made in such proceedings:

*Held*, that the issue of a warrant of possession against the appellant was without justification and it was a serious irregularity to have put him to trial of his title on an application for the execution of the foreclosure decree. A party who is dismissed from a suit on the ground that he has no concern with it is no longer a party to the suit and is not bound by the decree. When it was decided by the order discharging the appellant to treat his claim as being "outside the controversy of the suit", the decree in the suit could not be executed against him as a person bound by it and he could not be ejected by proceedings in which it is not open to him to question the validity of the mortgage or the correctness of the decree. If he was claiming in good faith to have a right of possession not affected by the suit mortgage he could not be ejected on any other footing save by an independent suit.

*P.C. A. No. 4 of 1942. 21st December, 1943.

For the purpose of interpreting a decree no other document is so directly in point as the judgment or can in the nature of things have comparable force.

*J. M. Parikh* and *S. P. Khambatta* for Appellant.

*Sir Thomas Strangman, K.C.* and *R. K. Handoo* for Respondents.

Their Lordships' Judgment was delivered by

SIR GEORGE RANKIN.—The matter for decision on this appeal is whether the respondents are entitled to recover possession from the appellant of a four annas share in a village called Chipabad. The question arises on an application for the execution of a final decree for foreclosure dated 20th June, 1930. The application was made by a tabular statement dated 19th July, 1933, by which the respondents, who were the plaintiffs in the foreclosure suit, asked that a warrant for possession of the four annas share be issued against the appellant. On 6th April, 1934, the trial Court (the Additional District Judge of Hoshangabad) ordered that a warrant for possession should issue to eject the appellant, and an appeal from this order was dismissed by the High Court at Nagpur on 24th September, 1937, against whose order this appeal is brought.

The respondents' mortgage is dated 31st May, 1919. It was for Rs. 8,000 and interest. The mortgagors were one Govindram and his son Rajaram. The dispute between the present parties arises on the construction of that part of the deed which describes the property and interest in mouza Chipabad which the deed transfers by way of security. According to the appellant's construction of the vernacular words, what Govindram and Rajaram mortgaged, subject to a certain exception as to *sir* lands, was "our *malguzari* rights" in a four annas share of Chipabad and another village, called Basantpura. According to the respondents' view what the deed transferred to them as their security was "our rights in the following *malguzari* mouzas," with the exception as to *sir* lands. No question now arises as to the other village and Chipabad may be regarded as the only village with which this case is concerned. To explain the difference between "our rights" and "our *malguzari* rights" it is necessary to make some reference to the title of Govindram and of Rajaram.

In 1895 the malguzar of Chipabad was one Radhakishan, and by a deed of 13th June, 1895, he had mortgaged Chipabad and Basantpura, together with the *sir* rights to three persons for Rs. 30,000 and interest. Of these three mortgagees, two (Sobhachand and Chogmal) had a half share in the security and one (Ramrao) had the other half. In 1898 these mortgagees had obtained possession. At the time of the respondents' mortgage of 31st May, 1919, Rajaram had acquired a 4 annas interest in Radhakishan's equity of redemption—the other 12 annas having come to be vested in one Partabchand, the appellant's brother. The half interest of Ramrao in the security had passed as to one moiety thereof to Govindram, who thus held a quarter (four annas) interest as mortgagee under the mortgage of 1895: while the other quarter which had belonged to Ramrao had passed to Govindram's brother Ganpat. On these facts the present respondents maintained that by the phrase "our rights in the *malguzari* mouza" Govindram and Rajaram had mortgaged the former's interest (four annas) in the security of 1895 as well as Rajaram's interest (four annas) in the equity of redemption. The appellant on the other hand contends that by the phrase "our *malguzari* rights in a four annas share" there was transferred to the respondents only Rajaram's interest in the equity.

Their Lordships turn now to state how the appellant Manakchand comes to be concerned in this controversy as to the meaning of the mortgage deed of 1919. By 1926 when the respondents sued to enforce that mortgage, the appellant had acquired both Ganpat's one-quarter interest in the security of 1895 and the half interest therein which had originally belonged to Sobhachand and Chogmal. The respondents' plaint was filed on 5th January, 1926.

It asked for payment of some Rs. 14,000 with future interest and in default of payment it claimed (*inter alia*) foreclosure and possession of four annas share of mouza Chipabad. Govindram and Rajaram, the mortgagors, were defendants 1 and 2. The appellant was defendant 11 and his brother Partabchand was defendant 10, both being impleaded "because they are attaching creditors of the property mortgaged after the date of the plaintiffs' mortgage" (para. 5 of plaint). The property subject to the mortgage was described (apart from a reference to the other village of Basantapura) as "4 annas share of mouza Chipabad." The appellant at that date was in fact an attaching creditor of Govindram's one-quarter interest as a mortgagee under the deed of 1895, but not of any interest of Rajaram in the equity. The appellant and his brother Partabchand had obtained a money decree against Govindram on 4th August, 1919. Under this decree two annas out of the four annas share of Govindram was sold on 3rd November, 1926, to one Gajrajsingh and the other two annas were sold to Gajrajsingh and Shriwallab on 28th September, 1926, under a decree obtained against Govindram and his son by another creditor called Haribhau in a suit of 1921. By transfers dated 6th May, 1927, these shares (four annas in all) were bought by the appellant, who was thus invested with such right, title and interest as Govindram had at the date of the sales in 1926. If Govindram's one-quarter interest in the security of 1895 was not comprised in the respondents' mortgage of 1919 they had no right to foreclose the appellant and he had no right of redemption. In their written statement filed in April, 1926, the appellant and his brother Partabchand pleaded that Govindram

"in whose name the mortgagee rights are recorded has not mortgaged his mortgagee right by the deed in suit. It is only the proprietary rights of the village shares in suit that are purported to be mortgaged by the deed in suit".

(para. 3). The respondents maintained

"that the deed in suit covers both these rights".

After many delays the case came before Mr. K. B. Sheorey, Additional District Judge on 24th September, 1928, when all the facts and dates of the appellant's title were laid fully before him as appears by the appellant's additional written statement of that date. The appellant's pleader stating that he did not wish to redeem the respondents' mortgage, the respondents' pleader said that they thought he had a right to redeem but if he did not wish to exercise it he might be discharged. The Judge's order was:

"As he claims a paramount title he is discharged without his costs".

At the next hearing, 20th November, 1928, the respondents apparently regretting the attitude which had been adopted on their behalf made an application to retain the appellant on record though he had claimed paramount title, but the learned Judge refused it saying that he saw no reason to vary his order of discharge dated 24th September, 1928.

No appeal was brought from this order and the case proceeded without the appellant. It was ultimately heard and decided on 24th August, 1929, by another Judge, Mr. S. Ghosh, Additional District Judge. The appellant's brother Partabchand contended that the respondents' mortgage deed was void because the mortgaged properties were not properly described in it. This argument, which seems to have been somewhat confused, was rejected by the learned Judge who arrived at the view that the mortgaged properties were properly described by holding on the construction of the deed of 1919 that the rights of Govindram as mortgagee under the deed of 1895 were not comprised in the respondents' security. His judgment on this point is quite elaborate and plain. His formal preliminary decree by the schedule thereto described the mortgaged property as "four annas share of mouza Chipabad". The final decree for foreclosure

on 20th June, 1930, followed the terms of the preliminary decree as was only right.

So far, therefore, the appellant's claim of title to an interest in Chipabad had been held by one learned Judge to be a matter which was not to be dealt with in the suit and by another learned Judge to be untouched by the mortgage security. This latter finding had been given by the trial Judge in the appellant's absence, and in connection with an argument that the said mortgage was void. But in passing a decree for foreclosure a Court may be supposed to concern itself to know and specify the property which is to be affected by its decree and the learned Judge had been at pains to make plain that no interest of Govindram in the security (mortgagee rights) of 1895 was being foreclosed by him or was being decreed to the respondents. From that decree no appeal was taken whether on the ground that the appellant ought to have been retained on the record as a party or on the ground that the trial Court had wrongly construed the deed or mistaken the extent of the interests which it comprised.

On 23rd July, 1930, the respondents obtained possession under Order 21, rule 35—symbolical possession, as it is called—a proceeding which in law put them in possession as against the other parties to the suit but neither disturbed the appellant's possession nor affected his rights in any way. After trying in vain to obtain from revenue officers some order which would in effect dispossess the appellant, they made to the trial Court on 19th July, 1933, the application in execution which is now before the Board in appeal. The Additional District Judge who dealt with this application was Mr. J. N. Haksar and his order of 6th April, 1934, was confirmed by Pollock and Digby, JJ., in the High Court on 24th September, 1937. It was ordered

> "that a fresh warrant of possession of four anna share of mouza Chipabad be given as against Manakchand [the appellant,] as representing the share that is mortgaged of Govindram and Rajaram, excluding cultivating rights in the *sir* lands which were not mortgaged".

The reasons given in both Courts are to the same effect. The construction put on the mortgage of 1919 in this execution proceeding is contrary to that given by the Judge who tried the suit; the security thereby granted being held to comprise the four annas interest of Govindram as mortgagee under the deed of 1895. The reasoning to the contrary in the judgment of 24th August, 1929, is treated as a merely incidental observation and not as a decision. It was said in the High Court that there was nothing in the decree to indicate that the possession of the four anna interest in Chipabad which was decreed to the plaintiffs was subject to the rights of Govindram as a mortgagee. Both Courts purport to interpret the foreclosure decree by the mortgage deed. But whereas the first Court says that it is necessary to look to the pleadings and judgment and the mortgage deed itself, the High Court say:

> "Reading the pleadings, the mortgage deed and the decree as a whole, we think that the decree was properly interpreted by the first Court".

They further held that the appellant having taken title from Govindram after the date of the plaint was bound by the decree and was a representative of Govindram. For this they cited a decision of the Board in *Parmeshari Din* v. *Ram Charan*[1].

Their Lordships do not consider it necessary for the determination of this appeal that they should decide the important, and by no means easy, question of the meaning of the vernacular language of the deed of 1919 on which Courts in India have differed. They think that the issue of a warrant of possession

1. (1937) 2 M.L.J. 359: A.I.R. 1937 P.C. 260 (P.C.).

against the appellant was without justification, and that the Courts in India have committed a serious irregularity in putting the appellant to trial of his title on an application for the execution of this foreclosure decree.

It might seem unnecessary to elaborate the proposition that a party who is dismissed from a suit on the ground that he has no concern with it is no longer a party to the suit and is not bound by the decree.

No doubt, if during the pendency of the foreclosure suit the appellant acquired from Govindram a right which was no more than an interest in the equity of redemption he would be bound by the decree. But that was not the claim of a right by which he was defending his possession. It was decided by the order of 24th September, 1928, to treat his claim as being "outside the controversy of the suit"—to use the language of Sir Lawrence Jenkins in *Radha Kishun* v. *Kurshed Hossein*[1]. The Court acted on the principle that his claim to a paramount title—be it right or wrong—would be in no way prejudiced by any foreclosure decree that might be passed. If he was right in his contention as to the interests comprised in the mortgage of 1919 the doctrine of *lis pendens* did not apply. In these circumstances, it seems contrary to the order of 24th September, 1928, that the decree should be executed against him as a person who was bound by it; and if he was claiming in good faith to have a right of possession not affected by the mortgage of 1919 he could not be ejected on any other footing (*cf.* Order 21, rule 99) save by an independent suit. But, independently of these objections, a proper construction of the foreclosure decree seems to their Lordships to afford to the respondents no basis for their claim to eject the appellant under it. Their Lordships cannot accept as correct the method adopted or the result arrived at by the Indian Courts. The question is not one of *res judicata* but of the meaning of the decree which these Courts were asked to enforce. The trial Judge had rejected the argument that the mortgage was void by holding that it did not include Govindram's right as mortgagee. *Non constat* that he would have decreed the suit if he had thought these rights to be included. Yet the appellant is to be ejected by proceedings in which it is not open to him to question the validity of the mortgage or the correctness of the decree. The High Court say that they interpret the decree by the mortgage deed and by the pleadings; and doubtless these documents will sometimes throw light on the meaning of a mortgage decree. What use the High Court have made of the pleadings in this case is not quite clear; but the use which they have made of the mortgage deed is only too plain. They find that the Judge's construction was erroneous and they construe his decree by an interpretation which he had expressly rejected. He had said in his judgment:

> "I thus conclude that the prior mortgage is not included in the mortgage in suit, and that four anna share of each of the villages Chipabad and Basantapura are mortgaged".

The words inserted in the schedule to the decree repeat the latter part of this sentence, and though chosen by him—not very happily, it is true—to show that certain rights were not mortgaged, are now interpreted as including those in the security—and that as against the appellant who had no say whatever in the drawing up of the decree. Such a result casts doubt upon the method by which it is reached. Under the Code the decree is the formal expression of the adjudication, (section 2); it is imperative that it should conform to the judgment (Order 20, rule 6); every Court has power to amend its decree so as to carry out its own meaning (*cf.* section 152). For the purpose of interpreting a decree no other document is so directly in point as the judgment or can in the nature of things have comparable force.

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1. (1919) 38 M.L.J. 424: L.R. 47 I.A. 11, 15: I.L.R. 47 Cal. 662 (P.C.).

Their Lordships are of opinion that the order to eject the appellant was irregular and unjustified. They will humbly advise His Majesty that this appeal should be allowed; that the orders of the Courts in India, dated 6th April, 1934, and 24th September, 1937, be set aside; and that the respondents' application in execution, dated 19th July, 1933, be dismissed as against the appellant Manakchand. The respondents will pay the appellant's costs in both Courts in India and his costs of this appeal.

Solicitors for appellant: *T. L. Wilson and Co.*

Solicitors for respondents: *Hy. S. L. Polak and Co.*

V. S. *Appeal allowed.*

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## [PRIVY COUNCIL.]

(On Appeal from the High Court of Judicature at Calcutta.)*

PRESENT:—LORD ROMER, LORD PORTER, LORD CLAUSON, SIR GEORGE RANKIN AND SIR MADHAVAN NAIR.

The Corporation of Calcutta .. *Appellant**

*v.*

The Province of Bengal .. *Respondent.*

*Calcutta Municipal Act (Bengal Act III of* 1923), *section* 127. (a)—*Building "ordinarily let"—House owned by Government and provided by it to its servant for occupation —No obligation on part of Government to provide house or of servant to live in it—Servant responsible for rent and occupier's share of the rates—Basis of rating—Master and servant —Servant occupying house provided by master—Nature of occupation, if as tenant or as servant.*

A house belonging to the Government was put at the disposal of the Commissioner of the Presidency Division in Bengal as his official residence. The occupation of the house was neither incidental to, nor dependent on the contract of service; nor was it necessary for the performance of his duties. Under the general rules applicable to Government servants, the Government is under no obligation to provide a house nor the servant to live in it, but if a house is provided the servant is in exclusive possession, and is responsible for the rent whether he lives in it or not; he may sublet with permission of Government, and has to pay the occupier's share of the rates. On a question as to whether for the purpose of the assessment to the consolidated rate of such a house, the annual value falls to be calculated under sub-section (*a*) or under sub-section (*b*) of section 127 of the Calcutta Municipal Act,

*Held, that* in the circumstances in which the house was put at the disposal of the Government servant and occupied by him under the terms of the above rules the house is a building "ordinarily let" within the meaning of section 127 (*a*) of the Calcutta Municipal Act and has to be accordingly rated.

Where both the master and servant are subjects, the mere fact that it is convenient to both parties that the servant should occupy a house owned by the master, and that the servant is put in possession of it for that reason, does not prevent the servant from being a tenant; his possession is that of a tenant unless he is required to occupy the premises for the better performance of his duties though his residence is not necesary for that purpose or if his residence there be necessary for the performance of his duties though not specifically required. The position is unaffected by the circumstance that the servant is entitled to occupy the house only so long as he retains his position as servant or the particular office in virtue of which the house is provided. The same principles apply though he may be a tenant at will.

*Sir Herbert Cunliffe, K. C.* and *Pringle* for the Appellant.

*Tucker, K. C.* and *Handoo* for the *Respondent.*

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*P. C. A. No. 23 of 1942. 21st December, 1943.

Their Lordships' Judgment was delivered by

Lord Porter.—This appeal is against the judgment and decree of the High Court of Judicature at Fort William in Bengal, dated 15th August, 1940, dismissing an appeal from the judgment and decree of the Chief Judge of the Court of Small Causes at Calcutta. The question at issue is whether, for the purpose of the assessment to the consolidated rate of a house in Calcutta owned by the respondent and occupied by the Commissioner of the Presidency Division in Bengal, the annual value falls to be calculated under sub-section (*a*) or under sub-section (*b*) of section 127 of the Calcutta Municipal Act (Bengal Act III of 1923). The section reads as follows:

"For the purposes of assessing land and buildings to the consolidated rate—(*a*) the annual value of land, and the annual value of any building erected for letting purposes or ordinarily let, shall be deemed to be the gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year, less in the case of a building, an allowance of 10 per cent. for the cost of repairs and for all other expenses necessary to maintain the building in a state to command such gross rent; and (*b*) the annual value of any building not erected for letting purposes and not ordinarily let shall be deemed to be 5 per cent. on the sum obtained by adding the estimated present cost of erecting the building, less a reasonable amount to be deducted on account of depreciation (if any) to the estimated present value of the land valued with the building as part of the same premises".

The house in question is No. 4, Theatre Road, Calcutta, which since its purchase by the respondent in 1906 has, with a few trivial exceptions, been occupied by the Commissioner as his official residence. The purpose for which it was erected is unknown, and the answer to the question which their Lordships have to determine therefore depends on whether it can be said to be ordinarily let or not. No question as to the amount chargeable arises. Whichever way their Lordships decide, the figures are not disputed. On one matter the disputants are not in conflict; it is agreed that ordinarily let means *usually* let, and it is not contended that the house must be shown to be let on ordinary terms.

The house was purchased on behalf of the respondent at the end of 1906 or early in 1907. Before buying it they wrote to the Government of India proposing to acquire a house which could be occupied by the Commissioner. From their letter it appears that the lack of suitable accommodation at reasonable cost, together with the possibility of being compelled to vacate at a moment's notice any premises taken, and of failing to re-let them, had resulted in the Commissioner either residing at his club or in an unsuitable position. The Government of Bengal were therefore anxious that a house should be available. In their view a good house in Calcutta itself, in an accessible and convenient situation which should be known to the public at large, was of the first importance. At that time they contemplated making residence compulsory. For about a year and a half after it was acquired the house was occupied by the tenant then in possession. Thereafter it has been, with the exception of two immaterial periods, occupied by the Commissioner for the time being. It is of the old residential type, standing in a large garden. Its value to rent is about Rs. 900, and it bears a nameplate with the inscription "Commissioner, Presidency Division".

Up to 1937 the assessment of the house had been treated as falling under section 127 (*b*) of the Act, but on the 13th of May in that year the respondent filed a suit in the Court of Small Causes, Calcutta, the appropriate Court for this purpose, claiming that the house was erected for letting, was let until 1908, and continued to be let thereafter, that a fair rent would be Rs. 700 per month, and that the correct annual value would be Rs. 7,560.

After hearing the evidence the Chief Judge held (1) that the house had been let to each successive Commissioner since its acquisition, he being responsible

for a sum as rent and the occupier's share of the taxes, both of which he was liable to pay so long as he held the post of Commissioner; (2) that during that period he had the right to occupy the property in consideration of his paying, or submitting to, a deduction from his salary of 10 per cent.; (3) that the relationship of landlord and tenant existed between the Government and the Commissioner, and that the correct basis of assessment was under section 127 (*a*), the correct figure for the annual value being Rs. 9,720.

On appeal to the High Court, the case was remitted to the Chief Judge to determine:—

(*a*) Whether the Commissioner was required to occupy the house for the performance of his services;

(*b*) Did he occupy it in order to their performance; or

(*c*) Was it conducive to that purpose more than any other house which he might have himself rented.

In pursuance of these directions the learned Chief Judge took further evidence, and, after doing so, held that the fact that it was made obligatory for the Commissioner to reside in the house, together with the facts that every Commissioner had continually done so since its acquirement, that it was known as the Commissioner's house, that it was situated in a convenient locality, and was in fact used by the Commissioner for the performance of some of his official duties, all led to the irresistible conclusion that the Commissioner

(*a*) was required to occupy the house for the performance of his duties;

(*b*) did occupy it in order to their performance; and

(*c*) that it was conducive to that purpose more than any other house which he might himself have rented.

The Chief Judge added that as a result of the additional evidence it appeared that the Commissioner occupied the house as a servant and not as a tenant.

When the record was returned to the High Court the learned Judges of that body differed from the Chief Judge. In their view the Commissioner held the house on the terms of the general rules applicable to all Government servants, and those rules did not compel him to occupy the house, but did make him responsible for rent, leaving him free to sub-let by permission of the Government. They further held that having regard to these findings and the fact that the Commissioner had given evidence that he could perform his duties equally well though residing in another house, a finding in the affirmative under heads (*b*) and (*c*) was not justified. Accordingly, they held that the Commissioner's occupation was that of a tenant and the house was assessable under section 127 (*a*).

The exact regulations which deal with the terms on which houses occupied by Government officials are provided are not easy to ascertain. In answer to a letter from the Deputy Executive Officer of the Calcutta Corporation, Mr. G. S. Dutt, the Secretary of the Government of Bengal, Department of Public Health and Local Self-Government, after stating in an earlier letter that the occupation of the house by the Commissioner was compulsory, corrected himself on 15th December, 1939, and said that the occupation was subject to certain rules, of which he enclosed a copy. These rules are printed in the record furnished to their Lordships, and are the only material so provided. Strictly speaking, they appear to contain internal regulations for the guidance

of the financial department of the Government of Bengal, and they are not so framed as to, nor in any case could they of themselves, contain a contract between the Government and one of its servants: see *Shenton* v. *Smith*[1]. Nor, indeed, do they authorize the Government or any one on its behalf to make such a contract. The power to make rules for regulating the conditions of service, pay and allowances of the Civil Service in India is to be found in the Government of India Act, 1915, section 96-B. Under that authority certain fundamental rules were made, that applicable to the present case being No. 45, which provides that

"A local Government may make rules laying down the principles governing the allotment to officers serving under its administrative control for use by them as residences of such buildings owned or leased by it.........as the local Government may make available for the purpose. Such rules..........may prescribe the circumstances in which such an officer shall be considered to be in occupation of a residence".

Rule 45 (*a*), after dealing with the method of calculating the capital cost to the Government of buildings which it acquires, and of ascertaining the standard rent of such as are leased, goes on to provide in sub-rule (*iv*) (*b*) that "unless in any case it be otherwise expressly provided in these rules" the officer,

"shall pay (*i*) rent for the residence, such rent being the standard rent or 10 per cent. of his monthly emoluments whichever be less, and (*ii*) municipal and other taxes payable by Government in respect of the residence not being in the nature of house or property tax."

The rule further sets out various modifications of the provisions as to rent in particular cases, and in sub-rule (*vi*) deals with the payment of additional rent in return for special services undertaken by the Government and requires the tenant to pay certain additional charges.

Under the provisions of fundamental rule 45, the Government of Bengal did make certain subsidiary regulations dealing with the provision of residences to their servants, but as these regulations do not substantially differ from the financial rules set out in the record their Lordships treat the latter, as the parties were content to treat them, as being applicable to the present case. Those rules provide:—

"279. Residence for public servants may be . . . .. purchased by Government. . . . (*iv*) when it is shown to the satisfaction of the local Government that suitable house accommodation for officers whose appointments are permanent in respect of locality is not available in the vicinity or is available only under circumstances which will be likely to place such officers in an undesirable position in relation to house proprietors.

*Rent Rules for Government buildings used as Residences.*

281. The incumbent, whether permanent or temporary, of an appointment for whose benefit a house has been constructed or purchased or leased by Government will be held responsible for the prescribed rent during his tenure of the appointment."

Certain instances are given in which the Local Government may make exception to this rule, *e.g.*, when the house is not occupied because the holder of another post is doing the duty, or when the holder has been transferred from a post in the same station and it is not considered necessary that he should change his residence, or when an Indian officer is appointed and the residence has been constructed to suit a European or *vice versa*, or where a temporary holder for not more than two months is prevented from occupying the house by circumstances which the Local Government consider sufficient to warrant an exception. Rule 282 permits the sub-letting of such residences provided:—

"(*i*) the sub-let should be to a tenant approved by the Superintending Engineer;

1. (1895) A.C. 229.

(*ii*) the officer will still remain personally responsible for the rent and for any damage caused to the building beyond fair wear and tear;

(*iii*) Government will not recognise the sub-tenancy;

(*iv*) The rent to be charged by the officer to his tenant should not, except with the sanction of the local Government in special circumstances, exceed the rent paid by the officer to Government;

(*v*) Sub-tenancy should continue only for so long as the officer who makes the arrangement holds the appointment for which the official residence is provided.''

The only further evidence to which their Lordships need refer is that of the Commissioner at the material time, who stated that he was in exclusive occupation, that he could live in any other residential quarter in order to perform his duties, and could perform them equally well there, that official residences of Commissioners are generally known as Commissioners' houses and that a knowledge of their position and their accessibility is important, and that he has to pay 10 per cent. of his salary whether he occupies the house or not. In the Courts in India the question at issue was apparently treated as if it had arisen between subject and subject, and no question was raised as to the possibility of establishing a contract between a Government and its servants or as to the authority under which such a contract was or could be made. Very scanty evidence has been furnished in the case and none as to the making of any contract. If there be any it must be spelt out of the facts established and mainly from the evidence of the Commissioner and the rules printed in the record.

Apart from the complication arising from the fact that the house is occupied by a Government servant, their Lordships find themselves in substantial agreement with the High Court in India. The general principles on which a tenancy as opposed to an occupation as servant is created are not in dispute. The mere fact that it is convenient to both parties that the servant should occupy a particular house, and that he is put in possession of it for that reason, does not prevent the servant from being a tenant; his possession is that of a tenant unless he is required to occupy the premises for the better performance of his duties though his residence is not necessary for that purpose or if his residence there be necessary for the performance of his duties though not specifically required: *see* per Brett, J., in *Fox* v. *Dalby*,[1] the position is unaffected by the circumstance that the servant is entitled to occupy the house only so long as he retains his position as servant or the particular office in virtue of which the house is provided. The same principles apply though he may be a tenant at will: see *Smith* v. *Seghill Overseers*[2] and *Marsh* v. *Estcourt*[3].

In the present case their Lordships are of opinion that the Commissioner is neither compelled to live in the house nor is it necessary for him to do so in order to perform his duty. As to the latter point, their Lordships have the Commissioner's evidence and nothing to contradict it. As to the former, it may be that when the house was purchased, it was contemplated that those holding the office of Commissioner would be compelled to live there, but if so, the intention was not carried out. He who holds the office is, indeed, required to pay rent, but provided he does so there is nothing to compel him to reside in the house. He may even sub-let it with the permission of the Government, though this does not involve a recognition of the sub-tenancy, and the sub-tenancy is to continue only for so long as the sub-lessor holds the appointment. Having regard to the facts that it is contemplated that the Commissioner should occupy the whole house, that he is under an obligation to pay what is called rent whether he occupies it or not, and that he pays the occupier's share of taxes, their Lordships would unhesitatingly come to the conclusion that the Commissioner occupied the house as a tenant in a

1. (1872) L.R. 10 C.P. 285 at p. 295.
2. (1875) L.R. 10 Q.B. 422.
3. (1889) 24 Q.B.D. 147.

case where any one other than Government was the owner. The difficulty in the case lies in that fact and in the fact that the Commissioner is a Government servant.

It was admitted on behalf of the respondent that except in special circumstances no contract would exist, or could be implied, between a Government and its servant in respect of that service, and that there was nothing in the present case which would prevent the ordinary rule from applying. But it was said that though no contract could be implied in respect of the service, yet a contract could be expressly made, or could be implied, between those parties in respect of matters other than the service. Having regard to this argument it has in the first place to be determined whether the occupation of the house formed part of, or was incidental to, the contract of service, or whether it formed a separate transaction between the Crown and the Commissioner. As to this question, their Lordships entertain no doubt that the occupation is not incidental to, nor is it dependent on, the contract of service. It is true that in the ordinary course the house would not be put at the disposal of the Commissioner unless he held that office. It is given to him for that reason, but its provision forms no part of the terms of service, and it is open to him to refuse to live there if he does not desire to do so. Certain limitations on the Commissioner's rights (if he have any) must be conceded, *viz.*:—

(*i*) Even if in the particular case there were a contract the servant would still be subject to summary dismissal at the pleasure of the Crown. *De Dohse* v. *Reg*[1].

(*ii*) The Commissioner might be transferred at any time to another post, and is entitled (if at all) to occupy the residence only whilst he holds the office.

(*iii*) The Crown could at any moment terminate his occupation of the house even though he remained in his post of Commissioner. In these circumstances, were it not for the considerations hereinafter mentioned, it would have to be determined whether he had any estate in the house or whether he was a mere licensee in occupation as a servant of the government. If he had any right it could be no more than a tenancy at will, since the Crown could terminate his occupation at any time and the tenancy (if any) must be implied since no express contract exists.

That such an implication is possible appears from *Doe d. Hull* v. *Wood*[2], where Parke B. said:

> "*Richardson* v. *Langridge*[3] correctly lays down the law on this subject, *viz.*, that a simple permission to occupy creates a tenancy at will."

It was suggested that in the present case the implication suggested would be impossible, inasmuch as a tenancy at will must be terminable at the will of either party. The Crown, it was contended, could terminate the occupation at any time, but the Commissioner could not. Their Lordships cannot accede to this argument. In their view the Commissioner could cease to occupy the house at any moment and thereupon would terminate any tenancy, though he would still remain liable for the payment of the yearly sum designated as rent. If, then, the existence of a tenancy at will can be implied, should such an implication be made in the case of a house situated in Calcutta, owned by the Government of the Province of Bengal and occupied as the Commissioner's house is occupied in the present instance? In their Lordships' view it is not necessary finally to determine this question. The rules, it is true, do not make a contract between

1. (1886) 66 L.J. (Q.B.) 422 (H.L.). 649.
2. (1845) 14 M. & W. 682 : 153 E.R. 3. (1811) 4 Taunt 128 : 128 E.R. 277.

the Crown and the Commissioner, but they do indicate the position if a house is in fact placed at his disposal. The Crown is under no obligation to provide a house nor the servant to live in it, but if a house is provided the Commissioner is in exclusive possession, and is responsible for the rent whether he lives in it or not; he may sub-let, and he pays the occupier's share of the rates. Whatever the effect of such a circumstance in other cases (as to which they express no opinion), their Lordships are of opinion that where a house is put at the disposal of a Government servant, occupied by him under the terms of the regulations applicable to the present case, and retained and enjoyed as this house has been, the building is ordinarily let within the meaning of the Act and is therefore rightly rated under section 127 (*a*) of the Calcutta Municipal Act (Bengal Act III of 1923). They will humbly advise His Majesty to dismiss the appeal. The appellants must pay the costs of the proceedings before the Board.

Solicitors for appellant: *W. W. Box and Co.*

Solicitor for respondent: *The Solicitor, India Office.*

V. S. *Appeal dismissed.*

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[END OF VOL. 1944—I.]

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